In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 129

UNITED STATES OF AMERICA

v.

BOSTON & MAINE RAILROAD

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

This case is now before the Court upon reargument, pursuant to the Order of February 18, 1929. The Order recites that the Court especially desires assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering

appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

This case originated in the United States District Court for the District of Massachusetts, and hence the first two questions are without application here. Those questions, as well as Questions 3 and 4, are fully dealt with in the brief filed in Case No. 130 (*Old Colony Trust Company et al, Executors,* v. *Commissioner of Internal Revenue*).

There can be no doubt that upon an appeal from the judgment of a United States District Court the Circuit Court of Appeals acts as a tribunal of appellate jurisdiction, and that a case is presented under Title 28, United States Code, Section 346, in which the Circuit Court of Appeals is authorized to certify any question deemed necessary for its proper decision.

The question upon the merits is whether the payment by the Boston & Maine Railroad, Lessee, pur-

suant to the terms of its lease, of the income taxes assessed against the Fitchburg Railroad Company, Lessor, constituted additional income to the Lessor.

The facts and the applicable statutes are set forth in the first brief for the United States.

Since the brief in Case No. 130 (*Old Colony Trust Company et al., Executors,* v. *Commissioner of Internal Revenue*) deals fully with Questions 3 and 4, which alone are applicable to this case, and since this Court has ordered that both cases be heard at the same time, it seems unnecessary to repeat the argument in this brief.

CONCLUSION

For the reasons appearing in the original brief for the United States, and the brief for the Commissioner of Internal Revenue on reargument in Case No. 130, it is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the affirmative.

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APRIL, 1929.

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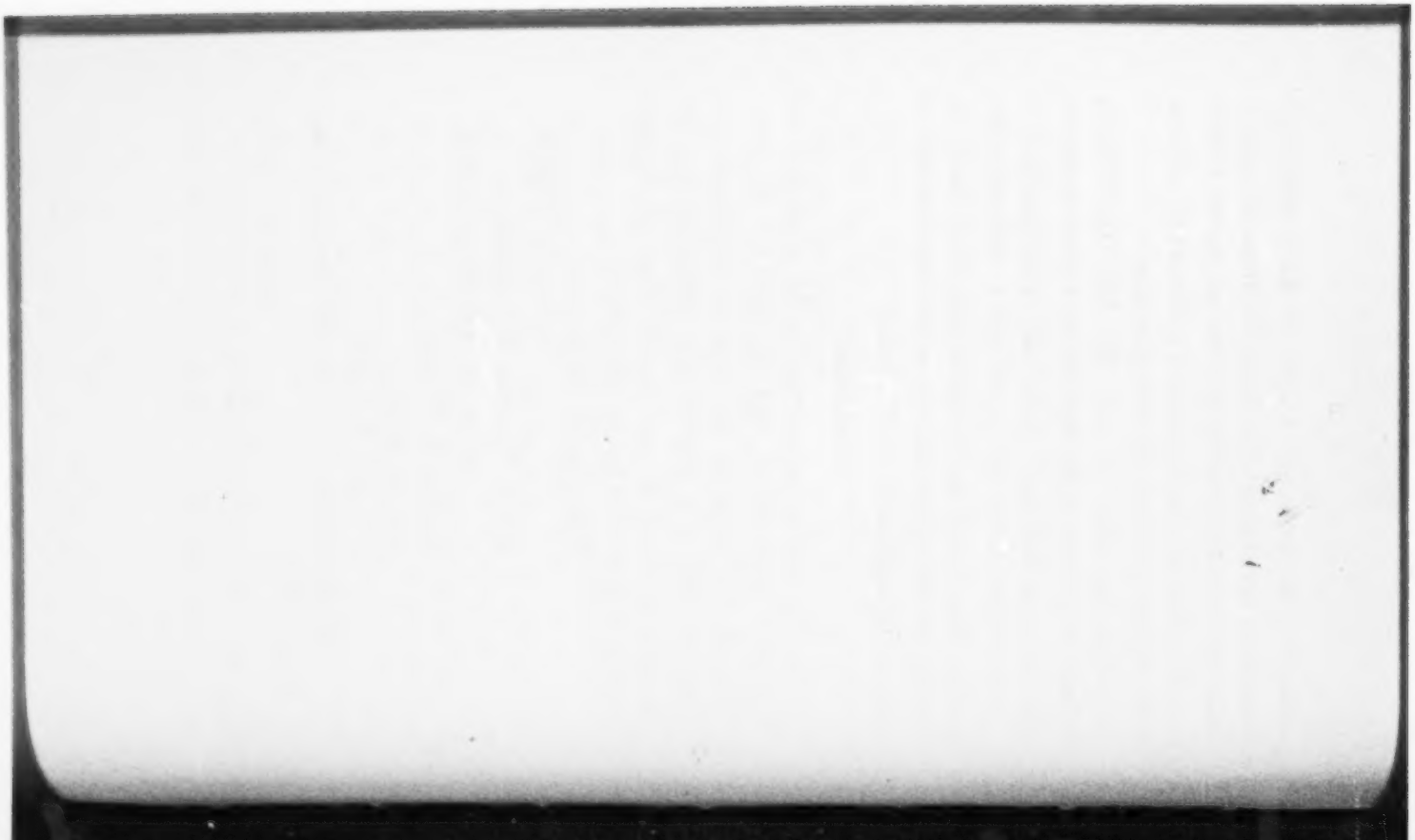

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 130

OLD COLONY TRUST COMPANY ET AL., EXECUTORS

v.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

STATEMENT

This case is now before the Court upon reargument, pursuant to the order of February 18, 1929. The order recites that the Court especially desires assistance of counsel in respect to the following matters:

> 1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?
>
> 2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when

considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

The question upon the merits is whether the payment by the American Woolen Company, pursuant to a resolution of its Board of Directors made in advance, of the income tax assessed upon the salary of its president, William M. Wood, constitutes additional income to the employee.

In conformity with the suggestion in the aforesaid order of this Court, the Circuit Court of Appeals for the First Circuit has amended the certificate. The facts material to the question now under consideration are (R. 5–7):

> This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, the Commissioner of Internal Revenue notified Mr. Wood by registered mail

of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The amount of this deficiency was revised by the Commissioner's letter of August 18, 1925. On August 22, 1925, an appeal was taken to the Board of Tax Appeals. In response to an order to make petition more definite and certain, an amended petition was filed October 27, 1925. The hearing before the Board of Tax Appeals was held April 11, 1927, and the decision of the Board of Tax Appeals was rendered November 12, 1927. The Board of Tax Appeals approved the action of the Commissioner and found a deficiency in the Federal income tax of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review in this Court of the decision of the Board of Tax Appeals, pursuant to the Revenue Act of 1926 and Rule 38 of this Court, was perfected December 23, 1927.

The statutes involved in the merits are set forth in the first brief for the Commissioner of Internal Revenue. The statutes involved in the question of jurisdiction are set forth in Appendix A to this brief.

SUMMARY OF ARGUMENT

The United States Board of Tax Appeals exercises functions of a judicial character. In reviewing decisions of the Board of Tax Appeals the Circuit Courts of Appeals exercise judicial power. Consequently, there was power in Congress to con-

fer jurisdiction upon the Circuit Courts of Appeals in such cases.

There can be no doubt that a proceeding to review a decision of the Board of Tax Appeals involves adverse parties and rights which may be prejudicially affected or wrongs to be remedied. The fact that the proceeding originated before an administrative body is not decisive since the decisions of this Court furnish many familiar precedents for similar reviews.

The judgment of the Circuit Courts of Appeals becomes the final and indisputable basis of administrative action. When a taxpayer appeals to a Circuit Court of Appeals he must either pay the tax or file a bond to insure its payment. Thus no process of the court is necessary to enforce its judgment.

This case was pending before the Board of Tax Appeals when the Revenue Act of 1926 was passed and there is some question whether the taxpayer has a right to pay the tax and institute an action for its recovery even after a decision of the Circuit Court of Appeals against him. This question is peculiar to the cases which were pending before the Board at the time of the passage of the 1926 Act, since it is clear that no such right exists in cases which were filed with the Board thereafter. The Act may be construed so that the right to relitigate the question is not open in any case, and we urge the familiar principle that a statute should always be given a construction which will make it valid. However, even if the statute must be construed so as to

give a taxpayer whose case was pending before the Board of Tax Appeals when the 1926 Act was passed a right to relitigate the matter, still the proceeding may be a case or controversy, if the doctrine announced in the Naturalization Cases is applicable. Moreover, a taxpayer always has the right to litigate the same question in a new suit against the collector. *Sage* v. *United States,* 250 U. S. 33.

In this case the Circuit Court of Appeals acts as an appellate tribunal and not as a tribunal of original jurisdiction, although to the extent that the Circuit Court of Appeals may require the taking of additional testimony, the proceeding may be regarded as in the nature of an original proceeding. The same situation existed in *United States* v. *Lies,* 170 U. S. 628, where this Court held that a review of a decision of the Board of General Appraisers was appellate in character. From this it follows that this proceeding in the Circuit Court of Appeals is a "case" within the meaning of Title 28, United States Code, Section 346, in which that court is authorized to certify any question deemed necessary for its proper decision. The certificate raises a single question of law and not the whole case. Under such circumstances, we submit that the jurisdiction exercised by this Court is intrinsically appellate and not an attempt to exercise an original jurisdiction not conferred by the Constitution.

It has always been the practice of the Treasury Department to compute total income by adding to the amount actually received by the taxpayer any

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tax which another has paid for his benefit under an agreement between the parties. In earlier years there was a lack of uniformity in treatment and in some cases the amount of *additional* tax paid by another was in turn added to the taxpayer's income. However, in 1923, the Treasury Department settled on the practice of adding only the original tax paid by another for the benefit of the taxpayer and abandoned any attempt to treat the additional tax as additional income. This practice has been consistently followed ever since and is now the settled policy of the Treasury Department.

There is no statute which specifically recognizes the principle of constructive receipt of income. Taxes paid by another for the benefit of the taxpayer constitute income to the latter. Thus the amount is embraced within the term "gross income" as defined in Section 213 (a) of the Revenue Act of 1918. The Treasury Department has consistently followed the policy of holding taxpayers accountable for income constructively received and the acquiescence of Congress in the practice amounts to a legislative sanction.

ARGUMENT

I

A PROCEEDING IN THE CIRCUIT COURT OF APPEALS TO REVIEW A DECISION OF THE BOARD OF TAX APPEALS IS A CASE OR CONTROVERSY WITHIN THE MEANING OF THE CONSTITUTION

The principle is settled that courts created by law to exercise the judicial power conferred by the

Constitution are purely judicial bodies. *Gordon* v. *United States,* 117 U. S. 697. In reviewing decisions of the United States Board of Tax Appeals the Circuit Courts of Appeals exercise judicial power, and consequently it was within the competency of Congress to confer jurisdiction on them in such cases.

The Board of Tax Appeals was established and continued as an independent agency in the executive branch of the Government by Section 900 (a) of the Revenue Act of 1924 and Section 1000 of the Revenue Act of 1926, and it is obvious that the Board is not a court created under the authority of Article III of the Constitution. This Court, however, has recognized that the Board exercises functions of a judicial character. *Blair* v. *Oesterlein Co.,* 275 U. S. 220. While it is true that the Board also exercises administrative functions which may not be reviewed by the courts (*Williamsport Co.* v. *United States,* 277 U. S. 551), the proceeding before the Board in the instant case involved a judicial determination of the same character as the decisions of the Court of Claims or of the United States District Courts in suits to recover taxes paid.

The case is reviewed upon the record made before the Board of Tax Appeals, which is prepared in accordance with rules adopted by the Circuit Courts of Appeals. (Section 1001 (b), Revenue Act of 1926.) The statute prescribes that the rules of evidence applicable in courts of equity of the

District of Columbia shall govern in proceedings before the Board of Tax Appeals. (Section 1000 (907 (a)), Revenue Act of 1926.) Accordingly, a decision of the Board of Tax Appeals is reviewed in the Circuit Court of Appeals upon a record which conforms to that made up in a proceeding in a District Court.

It was for these reasons that Congress determined that there could be no objection to imposing upon the Circuit Courts of Appeals the duty of reviewing the decisions of the Board. (Senate Report No. 52; House Report No. 1, 69th Congress, First Session. See Appendix B.) Those reports definitely show that Congress was satisfied that a review of the decisions of the Board could constitutionally be had by direct appeal to the courts.

There is a long line of decisions of this Court dealing with the question of the essential elements of a constitutional case or controversy, but it is not deemed necessary to enter into a detailed analyzation of those cases. They establish:

(1) That it is not within the power of Congress to assign to courts of the United States (other than those of the District of Columbia) any duties except such as involve a "case" or "controversy" within the meaning of the Constitution (*Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40);

(2) That for a proceeding to constitute a case or controversy within the meaning of the Constitution there must be (a) adverse parties (*Muskrat* v. *United States,* 219 U. S. 346; *United States* v.

Ferreira, 13 How. 40; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70), (b) a proceeding affecting rights in themselves appropriate subjects of judicial cognizance or a wrong to be redressed or prevented (*Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70), (c) finality to the judgment of the court (*Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *Hayburn's Case,* 2 Dall. 409; *Alexander* v. *United States,* 201 U. S. 117; *Frasch* v. *Moore,* 211 U. S. 1; *Baldwin Co.* v. *Howard Co.,* 256 U. S. 35; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693), and (d) power in the court to enforce any judgment which may be given (*Muskrat* v. *United States,* 219 U. S. 346; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *United States* v. *Ferreira,* 13 How. 40);

(3) That Congress has power to provide for the review of the action of administrative commissions or boards created by it which exercise only quasi judicial powers (*Stephens* v. *Cherokee Nation,* 174 U. S. 445; *United States* v. *Ritchie,* 17 How. 525); and

(4) That the power of the courts can be invoked in aid of an administrative body in the performance of its statutory duty (*Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447), even though that aid involve a review of questions of fact as well as questions of law, unless the aid sought would bring the courts in such intimate connection with the legislative power that it would result in the revision by

the courts of a legislative discretion confided to the administrative body (*Keller* v. *Potomac Electric Co.*, 261 U. S. 428).

In *Osborn* v. *United States Bank*, 9 Wheat. 738, Chief Justice Marshall construed Article III of the Constitution as follows (p. 819):

> * * * This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

Applying these tests to a proceeding to review a decision of the Board of Tax Appeals, we assume it will not be questioned that such an appeal meets the requirements that there be adverse parties and that the proceeding involve rights which may be prejudicially affected or wrongs to be remedied. It would seem only necessary to consider (1) whether the aid sought of the courts is to review a judicial, rather than a legislative or administrative determination; (2) whether there is authority to enforce such a judgment; and (3) whether the judgment is lacking in finality.

1. The fact that the proceeding originated before an administrative body is not decisive. *United States* v. *Ritchie,* 17 How. 525; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447; *Stephens* v. *Cherokee Nation,* 174 U. S. 445. While it may be said that upon transfer to the courts those proceedings were suits *de novo,* it is clear that whether its jurisdiction is original or appellate a court created under Article III of the Constitution can only consider a proceeding which meets all of the tests of a constitutional case or controversy. Accordingly, it is unimportant that those cases may be characterized as suits *de novo.* Furthermore, it is clear from an examination of the appellate procedure provided for the Federal Trade Commission (Act of September 26, 1914, c. 311, Section 5, 38 Stat. 717, 719; U. S. C. Title 15, Section 45) that a purely appellate review of the action of an administrative board violates no constitutional provision. In *L. B. Silver Co.* v. *Federal Trade Commission,* 292 Fed. 752, the Circuit Court of Appeals for the Sixth Circuit had held that its jurisdiction in such cases was original. This Court, however, in *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U. S. 619, said that the review was "appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

The appellate procedure established in the Revenue Act of 1926 is closely analogous to the appellate procedure established in the Act of June 10,

1890, c. 407, Sections 14 and 15, 26 Stat. 131, 137, 138, providing for the collection of the customs revenue. Section 15 provided for a review in the Circuit Court upon the record and the evidence taken by the Board of General Appraisers, together with a certified statement of the facts and the decision of the Board. The section further provided that upon application of the parties the case should be referred to one of the members of the Board of General Appraisers to take and return such further evidence as should be offered by the parties. The findings of the Board of General Appraisers, like the findings of the Board of Tax Appeals, were not disturbed by the courts unless the evidence wholly failed to support them. *In re Van Blankensteyn,* 56 Fed. 474, 477; *Marine* v. *Lyon,* 65 Fed. 992, 994.

The decision of this Court in *United States* v. *Lies,* 170 U. S. 628, shows that the review in the Circuit Courts was not a suit *de novo*. In that case the importer took an appeal to the Circuit Court from the decision of the Board of General Appraisers. The Government took no appeal but sought to be heard when the importer abandoned his appeal. The Circuit Court held that the Government could not be allowed to object to the decision of the Board because it had not sought a review of such decision. The judgment of the Circuit Court was affirmed by the Circuit Court of Appeals and the case was brought to this Court by a writ of certiorari. The judgment was affirmed, the Court saying (p. 636):

> Although the Circuit Court has, upon the application of the parties, power to take further testimony after the case is brought before it, and to that extent it may be regarded as something in the nature of a new proceeding, yet the proper procedure in deciding the appeal is in nowise altered thereby, and unless a party has appealed, and filed and served his statement as above mentioned, the court ought not to reverse on his motion.
>
> It is immaterial that the application is not named an appeal. It is such in substance, and the grounds and reasons for the appeal are to be stated. Although the board of general appraisers may not be a court, yet the proceedings to review its determination are pointed out by the statute, and they must be substantially followed and obeyed.

Thus it is clear that the review in the courts of the decisions of the Board of General Appraisers was an appellate proceeding and not a suit *de novo*. Many cases came to this Court involving that procedure but the jurisdiction was never questioned. *United States* v. *Passavant*, 169 U. S. 16; *United States* v. *Klingenberg*, 153 U. S. 93; *United States* v. *Schoverling*, 146 U. S. 76. On the contrary, the procedure was cited by this Court as an example of a proper method of reviewing determinations of an administrative body. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714.

In *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, the question was whether the Court

of Appeals of the District of Columbia had jurisdiction under Section 9 of the Act of February 20, 1905, c. 592, 33 Stat. 724, 727. That section provided that—

> If an applicant * * * is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the court of appeals of the District of Columbia * * *.

This Court held that it was without jurisdiction to review the action of the District Court of Appeals, not because the suit in that court was an appeal from an administrative body, but because the judgment to be given was administrative rather than judicial.

Since this Court has reviewed many proceedings which originated in the Federal Trade Commission and many proceedings which originated in the Board of General Appraisers and in both cases has characterized the review in the courts as appellate, we take it as settled that the courts may properly exercise their judicial power to review a proceeding commenced before an administrative body, even though the review in the courts is appellate and not a suit *de novo*.

2. While the judgment is not enforced through any process of the court it does become "the final and indisputable basis of action." *In re Sanborn, supra.* If the judgment results in sustaining the tax, Section 274 (b) of the Revenue Act of 1926 lays a positive duty upon administrative officers to assess and collect it. The same section prohibits

the collection of a deficiency which has been disallowed by the judgment, and Section 284 (e) requires the administrative officers to give effect to a finding that the taxpayer has overpaid his tax. When the appeal to the courts is taken by the taxpayer, Section 1001 (c) provides that the tax must be paid or a bond given to secure its payment. Thus the payment of the tax is safeguarded and no process of the court is necessary to collect it. The bond is, therefore, to be regarded as the equivalent of the money and so the satisfaction of the Government's claim has been anticipated and provided for.

We think that such a complete system already provided for giving effect to the judgment of the court may be said for all practical purposes to satisfy the requirement that there must be power to enforce the judgment. The judgment in *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, was similarly enforceable through the executive departments instead of through an award of execution by the court, but this Court nevertheless held that a case in the constitutional sense was presented for its consideration. *Fidelity Nat. Bank* v. *Swope,* 274 U. S. 123, clearly disposes finally of any contention that the award of execution is an indispensable element of a constitutional case or controversy. In that decision (p. 132) there are collected "familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to

carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties."

Unlike the officers in the *Gordon case, supra,* the administrative officers here are charged with the positive duty of collecting the tax or of abating it. It seems to be accepted that such a procedure satisfies the requirement of the power to enforce the judgment. Accordingly, we submit that the appellate procedure here under consideration is free from objection upon that score.

3. The Commissioner's letter notifying Mr. Wood of the deficiency in taxes which gave rise to this case was dated June 27, 1925. (R. 5.) The petition for review by the Board of Tax Appeals was filed August 22, 1925, and the hearing was held April 11, 1927. (R. 5.) These facts show that the case was pending before the Board of Tax Appeals when the Revenue Act of 1926 was enacted on February 26, 1926, and bring the case within the purview of Section 283(b) of that Act. That section provides that in such a case the powers, duties, rights, and privileges of the Commissioner and the taxpayer, and the jurisdiction of the Board and of the courts shall be governed by the Revenue Act of 1926, with the exception that the taxpayer shall not be subject to the provisions of Section 284(d). The latter section provides that if the taxpayer, *after the enactment of the Act of 1926,* files a petition with the Board of Tax Appeals—

> no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court—

with certain exceptions not material. The effect of these provisions is to compel such a taxpayer to elect whether to follow the method of review by way of the Board of Tax Appeals, or to pay the tax and bring suit in the ordinary way. If he elects the former method of review, the statute takes away all other methods.

The situation with respect to the taxpayer whose case was pending before the Board of Tax Appeals when the 1926 Act went into effect seems to be this: At the time he filed his petition he was required to make no election. Should the Board of Tax Appeals decide against him, he could then pursue his ordinary remedy in the courts. Congress properly deemed it unfair to him, and perhaps unconstitutional, to visit upon him consequences following an appeal to the Board of Tax Appeals which did not follow at the time he took that appeal. The intent of Section 283 (b), which said that he should not be subject to the provisions of Section 284 (d), was to leave him with the same remedies which he would have had, if the 1926 Act had not been passed. It went further, however, and gave him the right to take advantage of the 1926 Act, if he so elected. The latter Act, however, contained the provision

that the decision of the Circuit Court of Appeals should be final, unless reviewed by this Court. (Section 1003 (a).) It does not seem to be necessary to hold that the right given to appeal to the Circuit Court of Appeals must be deemed a right independent of and additional to the right to pursue the ordinary remedy by suit. The rights to the taxpayer and the purpose of the statute will be completely served if its provisions are construed so as to permit such a taxpayer, after decision by the Board of Tax Appeals, to elect either to proceed in accordance with the 1924 Act or to proceed in accordance with the 1926 Act. The other construction, namely, that it preserved the taxpayer's right to proceed in the ordinary way, and at the same time gave him the right to proceed under the 1926 Act without making the latter procedure final, is neither necessary, nor in accordance with familiar principles of statutory construction. In the first place, it would tend to cast doubt upon the constitutionality of the Act, something always to be avoided. In the second place, it would be contrary to the general policy of the law, recognized in the doctrine of *res adjudicata*. In the third place, it would tend to multiply litigation unnecessarily, something always to be regarded with disfavor. So long as the taxpayer's rights as they existed at the time he took his appeal to the Board of Tax Appeals are preserved, no injustice has been done him nor has he been deprived of anything. When, however, he elects to avail

himself of the new privileges granted by the Act, he ought to be held subject to the limitations which are attached to the privilege. In effect, he is not given two remedies, but rather, a choice between two remedies, and his election of one is a waiver of the other. Such a construction would satisfy every requirement of finality.

Another possible construction, the effect of which would be to give finality to the decision of the court upon appeal from the Board of Tax Appeals, is that Section 1003(a) of the 1926 Act, making the judgment of the courts upon a review of a decision of the Board final, means final in the sense that the ordinary principles of *res adjudicata* apply to it. Under such a construction a taxpayer might not be barred from bringing a suit in a District Court, nevertheless he might be met with the plea of *res adjudicata* if, as a matter of fact, the issue which he was attempting to relitigate was one which had been decided by the courts in a proceeding to review a decision of the Board of Tax Appeals. Section 283(b) merely relieves the taxpayer from the prohibition of Section 284(d), and does not itself grant any affirmative right to sue. Construing the statute in that way, there was no lack of finality in the judgment in the instant proceeding.

If, however, the provisions are to be construed as permitting the taxpayer to relitigate in a United States District Court the very questions presented to the courts by an appeal from the Board of Tax

Appeals, there may be a question whether in such cases those decisions have the finality requisite to a constitutional case.

However, the objection of a lack of finality would seem to be only one-sided, since there is no right given the Treasury Department further to litigate questions decided in the proceeding before the Board of Tax Appeals, and the decision in such a proceeding is a final and indisputable basis of administrative action. At the most, therefore, any objection as to lack of finality is confined to the effect of the judgment upon the taxpayer, and apparently he always has had the right to litigate the same questions in a new suit against the collector. *Sage* v. *United States,* 250 U. S. 33.

In any event, if the statute must be construed so as to give a taxpayer whose case was pending before the Board when the 1926 Act was passed a right to relitigate the same questions which have been decided after appeal to the courts from the Board of Tax Appeals, such a proceeding may still be a case in the constitutional sense if the decisions in *United States* v. *Ness,* 245 U. S. 319, and *Tutun* v. *United States,* 270 U. S. 568, are applicable. The *Ness* case was brought under Section 15 of the Naturalization Act in a United States District Court to cancel a certificate of naturalization issued by a State court. This Court held that the decision in the first proceeding was not *res judicata,* but that the United States, after having entered its appearance in the naturalization court, might file an independent suit

to cancel the certificate and urge the very grounds which were overruled by the naturalization court. In the *Tutun* case, this Court held that such a petition for naturalization is clearly a case within the meaning of the Constitution. That the naturalization proceeding in the *Ness* case was had in a State court is unimportant since the same conclusion was reached in *Maney* v. *United States,* 278 U. S. 17, where the naturalization certificate was obtained in a United States District Court.

It should be noted that the existence of the jurisdiction in cases within the scope of Section 283 (b) and (f) has been assumed without discussion by all of the Circuit Courts of Appeals which have reviewed such cases. It has been exercised by the Circuit Courts of Appeals in all but the Sixth Circuit.[1] In that Circuit no decision involving such a case has as yet been rendered.

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[1] In the following cases the Circuit Courts of Appeals have entertained jurisdiction of petitions to review decisions of the Board of Tax Appeals in cases arising under Section 283 (b) or (f): First Circuit: *Hamilton* v. *Commissioner*, 24 F. (2d) 668; *Commissioner* v. *Old Colony Railroad*, 26 F. (2d) 408; *De Ford* v. *Commissioner*, 29 F. (2d) 532; *Rhode Island Hospital T. Co.* v. *Commissioner*, 29 F. (2d) 339. Second Circuit: *Fraser* v. *Commissioner*, 25 F. (2d) 653; *De Ver H. Warner, etc.*, v. *Commissioner*, 26 F. (2d) 1023; *DeLoss* v. *Commissioner*, 28 F. (2d) 803; *Wm. C. Shanley, Jr.*, v. *Commissioner*, 28 F. (2d) 1018; *Oswego & S. R. Co.* v. *Commissioner*, 29 F. (2d) 487; *Hardwick Realty Co.* v. *Commissioner*, 29 F. (2d) 498; *Ice Service Co.* v. *Commissioner*, 30 F. (2d) 230. Third Circuit: *Bishoff* v. *Commissioner*, 27 F. (2d) 91; *Thompson* v. *Commissioner*, 28 F. (2d) 247; *Saunders* v. *Commissioner*,

We are advised that there are now pending in the Circuit Courts of Appeals approximately 200 cases like the one at bar in which the appeal to the Board of Tax Appeals was taken before the 1926 Act was passed, and that there are approximately 1,000 cases now pending before the Board of Tax

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29 F. (2d) 834. FOURTH CIRCUIT: *Lavenstein Corporation* v. *Commissioner*, 25 F. (2d) 375; *Wheeling Tile Co.* v. *Commissioner*, 25 F. (2d) 455; *MacCorkle* v. *Commissioner*, 26 F. (2d) 247; *Kleeson Co.* v. *Blair*, 28 F. (2d) 557. FIFTH CIRCUIT: *Avery* v. *Commissioner*, 22 F. (2d) 6; *Brown* v. *Commissioner*, 22 F. (2d) 797; *Harry S. Kaufman* v. *Commissioner*, 24 F. (2d) 44; *Southport Mill* v. *Commissioner*, 26 F. (2d) 17; *New Orleans Shipwright Co.* v. *Commissioner*, 27 F. (2d) 214; *Carr* v. *Commissioner*, 28 F. (2d) 551; *Lee* v. *Commissioner*, 28 F. (2d) 551; *Reinschmidt* v. *Commissioner*, 28 F. (2d) 660; *Zimmern* v. *Commissioner*, 28 F. (2d) 769; *Daniel Bros. Co.* v. *Commissioner*, 28 F. (2d) 761; *R. L. Crook* v. *Commissioner*, 23 F. (2d) 1000; *Richmond Hosiery Mills* v. *Commissioner*, 29 F. (2d) 262; *Blair* v. *Mathews*, 29 F. (2d) 892; *W. J. Howard* v. *Commissioner*, 29 F. (2d) 895. SEVENTH CIRCUIT: *Arthur R. Jones Syndicate* v. *Commissioner*, 23 F. (2d) 833; *Kosmerl* v. *Commissioner*, 25 F. (2d) 87; *Metropolitan Business College* v. *Blair*, 24 F. (2d) 176; *W. S. Bogle & Co.* v. *Commissioner*, 26 F. (2d) 771; *Fred L. Mandel* v. *Blair*, 26 F. (2d) 1019; *North American Ry. Const. Co.* v. *Commissioner*, 27 F. (2d) 493; *Buttolph* v. *Commissioner*, 29 F. (2d) 695; *Greengard* v. *Commissioner*, 29 F. (2d) 502. EIGHTH CIRCUIT: *Ruth Iron Co.* v. *Commissioner*, 26 F. (2d) 30; *Mastin* v. *Commissioner*, 28 F. (2d) 748; *Minnehaha Nat. Bank* v. *Commissioner*, 28 F. (2d) 763; *Conklin-Zonne-Loomis Co.* v. *Commissioner*, 29 F. (2d) 698; *Kendrick Coal & Dock Co* v. *Commissioner*, 29 F. (2d) 559; *Denver Live Stock Com'n. Co.* v. *Commissioner*, 29 F. (2d) 543. NINTH CIRCUIT: *Royal Packing Co.* v. *Commissioner*, 22 F. (2d) 536; *Blair* v. *Roth*, 22 F. (2d) 932; *Lassen Lumber & Box Co.* v. *Blair*, 27 F. (2d) 17.

Appeals and not yet decided by it, in which the appeals were taken to the Board before the 1926 Act was passed. If the section dealing with appeals taken to the Board of Tax Appeals before the 1926 Act was passed be construed to deprive the judgments of the United States Circuit Court of Appeals of finality, a serious situation is presented.

In respect of cases where the appeals to the Board were taken after the 1926 Act was passed and where, by the plain provisions of the statute, judgments of the Circuit Courts of Appeals finally determine the rights of the parties and become the final and indisputable basis for satisfaction of the taxpayer's liability, it seems to be clear that a case or controversy is presented to the Circuit Court of Appeals. Any doubt with regard to finality is confined to the cases which were pending before the Board at the time the 1926 Act was passed, and that doubt is not, we submit, insuperable.

If it should be necessary to hold the appellate procedure invalid as it affects cases which were pending before the Board of Tax Appeals at the time of the passage of the 1926 Act, we think it is obvious that the saving clause of Section 1213 of the Act will permit the appellate procedure with respect to cases filed later to remain unaffected. There is no necessary relation between the two classes of cases which will prevent the separation of the invalid portion, leaving the appellate procedure in full force with respect to those cases filed with the Board of Tax Appeals after the passage of the 1926 Act.

II

WHETHER THE CIRCUIT COURT OF APPEALS, IN REVIEWING DECISIONS OF THE BOARD OF TAX APPEALS, ACTS AS A TRIBUNAL OF ORIGINAL JURISDICTION OR AS AN APPELLATE TRIBUNAL, IT MAY CERTIFY TO THIS COURT QUESTIONS DEEMED NECESSARY FOR THE PROPER DECISION OF A PENDING CAUSE

Referring to the judicial power of the United States, Chief Justice Marshall, in *Osborn* v. *United States Bank,* 9 Wheat. 738, 829, said:

> In these cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States can not be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct.

Apparently, the judicial power of the United States may be exercised first in its appellate form. In *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U. S. 619, this Court said that the review by the Circuit Court of Appeals in Federal Trade Commission cases was "appellate and revisory merely and not an exercise of original jurisdiction by the Court itself." See also *United States* v. *Lies,* 170 U. S. 628.

While the review of the Circuit Court of Appeals seems to be appellate in form, the statute authorizes the court to remand the case for a rehearing. (Section 1003(b), Revenue Act of 1926.) To the extent that the Circuit Court of Appeals may require the taking of additional testimony, the pro-

ceeding may be regarded as in the nature of a new proceeding. On the question whether a case in the constitutional sense is presented, however, it seems to be immaterial whether the proceeding is a suit *de novo* or an appeal.

If the Circuit Court of Appeals acts as an appellate tribunal, there can be no doubt that it may certify to this Court questions deemed necessary for the proper decision of a pending cause. If, however, the proceeding in the Circuit Court of Appeals is regarded as calling for the exercise of original jurisdiction by that court, the question arises whether the original jurisdiction of this Court is invoked when it considers a certificate from a Circuit Court of Appeals. In this connection it is interesting to note that in the revision of the Judicial Code by the Act of February 13, 1925 (c. 229, 43 Stat. 936), Section 239 was changed so that the former language "in any case within its appellate jurisdiction" now appears as "in any case, civil or criminal."

Historically, this Court for many years entertained and decided questions certified as a part of its appellate jurisdiction. Section 6 of the Act of April 29, 1802 (c. 31, 2 Stat. 156, 159), provided for the certification of distinct questions of law by the Circuit Courts in advance of decision or judgment there. That Act was superseded by the Act of June 1, 1872 (c. 255, 17 Stat. 196). This legislation is set forth in a footnote to *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 215

U. S. 216, 222. Sections 650, 652, and 693 of the Revised Statutes restricted the Act of 1872 to civil suits and proceedings, and by Sections 651 and 697 the provisions of Section 6 of the Act of 1802 were reenacted as to criminal cases. (*United States* v. *Rider,* 163 U. S. 132, 136.) The first Act of Congress which authorized a criminal case to be brought from a Circuit Court to this Court except upon a certificate of difference of opinion was the Act of February 6, 1889 (c. 113, 25 Stat. 655).

The following decisions of this Court show the practice respecting certificates under the Act of 1802:

United States v. *Bailey* (1885), 9 Pet. 267.
Veazie v. *Wadleigh* (1837), 11 Pet. 55.
Adams v. *Jones* (1838), 12 Pet. 207.
White v. *Turk* (1838), 12 Pet. 238.
Nesmith v. *Sheldon* (1848), 6 How. 40.
United States v. *Chicago* (1849), 7 How. 185.
Webster v. *Cooper* (1850), 10 How. 54.
Ex parte Milligan (1866), 4 Wall. 2.
United States v. *Northway* (1886), 120 U. S. 327.
United States v. *Perrin* (1888), 131 U. S. 55.

This court assumed jurisdiction in those cases save where the certificate was so broad that it brought the whole case to this Court. In *United States* v. *Chicago, supra,* the Court assumed jurisdiction despite a dissenting opinion by Mr. Justice

Catron, in which he expressed the view that the Court was asked to grant an injunction which was an exercise of original jurisdiction.

In *Veazie* v. *Wadleigh, supra* (p. 60), the procedure was referred to as "a novel mode of obtaining the decision of an appellate court."

In *White* v. *Turk, supra*, it was held that the Court was without jurisdiction because the certificate brought up the whole case, and a distinction was there made between such a certificate and one which presented a single definite question of law. At page 239 it was said:

> This certificate, therefore, brings the whole cause before this court; and if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction.

The certificates in *Nesmith* v. *Sheldon,* and *Webster* v. *Cooper, supra,* were dismissed for want of jurisdiction because the whole case was certified. In *Webster* v. *Cooper,* Chief Justice Taney said (p. 55):

> This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction, in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals.

A similar expression is found in the opinion of *United States* v. *Perrin, supra,* at page 58.

In *State* v. *Crocker*, 5 Wyo. 385, the Supreme Court of Wyoming held that in entertaining certificates from inferior courts it was exercising appellate jurisdiction.

We submit that this long-continued practice establishes that when, as in this case, a certificate is presented which raises a single question of law and not the whole cause, the jurisdiction exercised by this Court is intrinsically appellate and not original.

However, as already pointed out, we think the decisions in *Federal Trade Commission* v. *Eastman Kodak Co.*, and *United States* v. *Lies, supra,* justify the belief that the Circuit Courts of Appeals exercise appellate jurisdiction when reviewing decisions of such a tribunal as the Board of Tax Appeals.

III

TAXES PAID BY ANOTHER FOR THE BENEFIT OF THE TAXPAYER HAVE CONSISTENTLY BEEN REGARDED BY THE TAXING OFFICERS AS ADDITIONAL INCOME TO THE TAXPAYER

There is attached hereto as Appendix C a letter from the Commissioner of Internal Revenue showing that it has always been the practice of the Treasury Department to compute total income by adding to the amount actually received by the taxpayer, the amount of any tax which another has paid for his benefit under an agreement between the parties. It is true that in earlier years there was

a lack of uniformity in treatment and that in some cases the amount of *additional* taxes paid by another was in turn added to the taxpayer's income. Since 1923, however, the practice has been settled and the Treasury Department has added only the *original* tax paid by another, and abandoned any attempt to treat the *additional* tax as additional income.

It is also true that neither before nor since 1923 has the Treasury Department ever resorted to an algebraic formula to compute the tax.

IV

THE AMOUNT OF TAX PAID BY THE EMPLOYER IN THIS CASE FOR THE BENEFIT OF THE EMPLOYEE IS REACHED BY APPLICABLE STATUTES IMPOSING UPON THE EMPLOYEE A TAX UPON INCOME DERIVED FROM PERSONAL SERVICES

There are no applicable statutes dealing specifically with the question of constructive receipt of income. However, applicable statutes imposed taxes upon income derived from personal services. When, as in this case, an employer agrees in advance, in consideration of the services rendered by his employee, to "pay any and all income taxes" imposed upon the employee's salary, the amount of the tax so paid by the employer for the benefit of the employee is constructively received by the employee and constitutes a part of his gross income.

The cases cited in the Commissioner's first brief demonstrate that the principle of constructive re-

ceipt is too well established to be questioned. That this principle is no modern innovation is shown by the fact that Article V of the Articles of Confederation, dealing with delegates in Congress, provided:

> Nor shall any person, being a delegate, be capable of holding any office under the United States for which he, *or another for his benefit* receives any salary, fees, or emolument of any kind. (Italics supplied.)

West End St. Ry. Co. v. *Malley* (C. C. A. 1st), 246 Fed. 625 (certiorari denied, 246 U. S. 671), shows that the principle was applied by the Treasury Department in assessing taxes under the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, and in assessing taxes under the Act of October 3, 1913, c. 16, 38 Stat. 114, 166. The tax was sustained as to the 1913 Act by the above-cited decision of the Circuit Court of Appeals, on December 10, 1917. Certiorari was denied by this Court April 15, 1918. In the Revenue Acts passed since that time, Congress has evinced no disapproval of the practice and such acquiescence of Congress amounts to a legislative sanction. *National Lead Co.* v. *United States,* 252 U. S. 140. The inaction of Congress in this matter is especially significant when it is remembered that a similar practice of the Treasury Department in dealing with taxes withheld at the source was promptly ended by a specific provision in the Revenue Act of 1921, c. 136, Section 234 (a) (3), 42 Stat. 227, 254. (See original brief, p. 16.)

CONCLUSION

It is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the affirmative.

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APPENDIX A

REVENUE ACT OF 1924, ACT OF JUNE 2, 1924, C. 234, 43 STAT. 253

SEC. 274. (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired. (U. S. C., Title 26, Sec. 1049.)

SEC. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

(b) Each member of the Board shall be appointed by the President, by and with the advice

and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. The term of office of all members who are to compose the Board during the period of two years after the enactment of this Act, shall expire at the end of such period. The terms of office of the first seven members who are thereafter to compose the Board shall expire, two at the end of the fourth year, two at the end of the sixth year, two at the end of the eighth year, and one at the end of the tenth year, after the expiration of such two-year period. The term of office of each such member shall be designated by the President, and the terms of office of their successors shall expire ten years after the expiration of their predecessors' terms, except that any individual appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor, and a member in office at the expiration of the term for which he was appointed may continue in office until his successor is qualified. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason. Each member shall receive a salary at the rate of $7,500 per annum.

* * * * *

(g) In any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be prima facie evidence of the facts therein stated. (U. S. C., Title 26, Secs. 1211–1213, 1218.)

REVENUE ACT OF 1926, ACT OF FEBRUARY 26, 1926, C. 27, 44 STAT. 9

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed

or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing. (U. S. C. App., Title 26, Sec. 1048.)

SEC. 277. (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner

shall mail a notice under such subdivision within 60 days after the making of the assessment.

(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) of section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

(d) If the jeopardy assessment is made after the decision of the Board is rendered such assessment may be made only in respect of the deficiency determined by the Board in its decision.

(e) A jeopardy assessment may not be made after the decision of the Board has become final or after the taxpayer has filed a petition for review of the decision of the Board.

(f) When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final,

together with interest thereon as provided in subdivision (j) of this section.

(g) If the bond is given before the taxpayer has filed his petition with the Board under subdivision (a) of section 274, the bond shall contain a further condition that if a petition is not filed within the period provided in such subdivision, then the amount the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subdivision.

(h) Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(i) When the petition has been filed with the Board and when the amount which should have been assessed has been determined by a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated.

If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 284. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

(j) In the case of the amount collected under subdivision (i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under subdivision (i) of this section, or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in subdivision (j) of section 274. If the amount included in the notice and demand from the collector under subdivision (i) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month (or, for any period the estate of the taxpayer is held by a fiduciary appointed by any court of competent jurisdiction or by will, at the rate of 6 per centum per annum) from the date of such notice and demand until it is paid.

(k) No claim in abatement shall be filed in respect of any assessment made after the enactment of this Act in respect of any income, war-profits, or excess-profits tax. (U. S. C. App., Title 26, Secs. 1051, 1063.)

SEC. 282. (a) Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the provisions of subdivision (a) of section 274, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claim for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver. (U. S. C. App., Title 26, Sec. 1071.)

SEC. 283. (b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In

all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284. (U. S. C. App., Title 26, Sec. 1064.)

SEC. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund

or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g), or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid. (U. S. C. App., Title 26, Sec. 1065.)

TITLE X.—BOARD OF TAX APPEALS

SEC. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

TITLE IX.—BOARD OF TAX APPEALS

Membership of Board

SEC. 900. The Board of Tax Appeals (hereinafter referred to as the "Board") is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act. (U. S. C. App., Title 26, Secs. 1211–1222.)

SEC. 901 (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each

member shall receive salary at the rate of $10,000 per annum.

(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. (U. S. C. App., Title 26, Sec. 1213.)

* * * * *

SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment. (U. S. C. App., Title 26, Sec. 1216.)

* * * * *

SEC. 906. (f) The findings of the Board made in any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be prima facie evidence of the facts therein stated. (U. S. C. App., Title 26, Sec. 1218.)

SEC. 907. (a) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public and shall be stenographically reported. The Board is authorized to contract for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The mailing by registered mail of any pleading, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, order, notice, or process.

(b) It shall be the duty of the Board and of each division to make findings of fact and a decision in each case before it, and report thereon in writing; except that the findings of fact and report thereon may be omitted in case of a decision dismissing any proceeding

upon motion either of the taxpayer, the Commissioner, or the Board. Whenever the Board deems it advisable, the report shall contain an opinion in writing in addition to the findings of fact and decision.

(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents. * * *
(U. S. C. App., Title 26, Sec. 1219.)

SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpoena ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent. (U. S. C. App., Title 26, Sec. 1220.)

SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926. (U. S. C. App., Title 26, Sec. 1220.)

SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax. (U. S. C. App., Title 26, Sec. 1223.)

SEC. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such

rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

* * * * *

(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under Title II or Title III of the Revenue Act of 1924 or of this Act. If as a result of a waiver under subdivision (d) of section 274 or subdivision (d) of section 308 any part of the amount determined by the Board is paid after the filing of the review bond such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the

amount so disallowed shall be credited or refunded to the taxpayer, or, if collection has not been made, shall be abated. (U. S. C. App., Title 26, Sec. 1224.)

SEC. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (U. S. C. App., Title 26, Sec. 1226.)

SEC. 1122. (a) If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data. (U. S. C. App., Title 26, Sec. 1258.)

SEC. 1213. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby. (U. S. C. App., Title 26, Sec. 1271.)

APPENDIX B

Senate Report No. 52, and House Report No. 1, 69th Congress, First Session, explain the court review of decisions of the Board of Tax Appeals in practically identical language. The following is taken from the Senate Report (pp. 36–37):

> *Court review—Questions of fact and law.*—The procedure for review of determinations of the board is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the Packers and Stockyards Act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of Section 1003 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper

interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 of the revenue act of 1924 as amended in the pending bill and subdivision (b) of section 1003 of the pending bill). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax

in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The principles discussed in the preceding paragraph are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, as in the importation of merchandise and the admission of aliens. In adhering to such principles the committee is of the opinion that it is establishing an appellate procedure that is unquestionably constitutional.

Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

APPENDIX C

TREASURY DEPARTMENT,
Washington, April 2, 1929.

Hon. MABEL WALKER WILLEBRANDT,
Assistant Attorney General,
Department of Justice, Washington, D. C.

Attention: Mr. Sewall Key.

In re: Old Colony Trust Company et al, Executors, Estate of William M. Wood, Deceased, *v.* Commissioner of Internal Revenue. Docket No. 6508.

MADAM: Reference is made to the oral request of March 25th of Mr. Key for data regarding the practice followed by the Bureau in making assessments in cases where, by agreement between the parties the tax laid upon the income actually received by one of them has been paid by another, which data is for use in connection with the preparation of a brief to be filed in the Supreme Court in the above case.

A careful examination of the Bureau's records shows that it has been the uniform practice to treat taxes paid under the foregoing circumstances as income to the taxpayer whose liability has thus been discharged. The earliest published ruling on this question was dated December 17, 1917, and designated as Treasury Decision 2620 (19 Treasury Decisions, 411). This ruling was the decision of the Circuit Court of Appeals for the First Circuit in the case of *West End Street Railway Company* v. *John F. Malley, Collector,* 246 Fed. 625, certiorari denied, 246 U. S. 671.

In the *West End Street Railway Company case* the Court held that dividends paid by a lessee corporation directly to the stockholders of the lessor corporation, constituted income to the lessor under the Revenue Act of October 3, 1913. The principle laid down by this Court decision was carried into Regulations 33 (revised), promulgated January 2, 1918, as Article 102, which reads as follows:

> ART. 102. *Leased properties.*—When a corporation shall have leased its property in consideration that the lessee shall pay in lieu of rental an amount equivalent to a certain rate of dividends on its capital stock or the interest on its outstanding indebtedness, together with taxes, insurance, or other fixed charges, such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee direct to the stockholders and bondholders of the lessor. The lessee, in making these payments direct to the bondholders and the stockholders, does so as the agent of the lessor, and the latter is none the less liable to return the amounts thus paid as income and to pay any tax that may be due thereon. (T. D. 2620.)

Article 102 of Regulations 33 has been substantially embodied in all subsequent regulations as Article 546 of Regulations 45, Article 547 of Regulations 62, 65, and 69, and Article 70 of Regulations 74, promulgated under the Revenue Acts of 1918, 1921, 1924, 1926, and 1928, respectively.

Article 109 of Regulations 45, promulgated January 28, 1921, reads as follows:

> * * * Taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter.

This provision is also found in Article 109 of Regulations 62, Article 110 of Regulations 65 and 69, and Article 130 of Regulations 74.

In addition to the foregoing general provisions a specific ruling on this question was published in May, 1920, as A. R. M., 16, C. B. 2, page 62. The facts in that case were as follows: A contract was entered into in July, 1917, between the P Company and the M Company whereby the latter agreed to sell certain goods on a cost-plus basis. It was provided that the P Company should pay Federal taxes assessed on the profits accrued from this contract to the M Company. Performance under the contract was made by the M Company during 1918. In October, 1918, the P Company closed its books upon an accrual basis and made no provision for any taxes arising out of the contract. It was there held that the amount of taxes of the M Company paid by the P Company was income to the M Company for the year for which such payment was made. This ruling was followed not only in the case in which rendered, but also as a precedent in all other similar cases.

Not a single instance has been found where the Bureau has departed from this general practice of construing taxes paid under the present circum-

stances to be income to the taxpayer whose tax liability has been discharged in such a manner.

While the general principle was well established, prior to 1923 there was a lack of uniformity in the method of application. The records of the Bureau show that in some cases only the amount of the original tax paid by another was added to the taxpayer's gross income. In other cases, the amount of the additional tax paid by another was in turn added to the taxpayer's gross income. In certain cases only the amount of the original tax was added in computing the excess-profits tax while the amount of the additional tax was in turn added in computing income taxes.

This varying treatment was due to the fact that no settled policy had been adopted for the Bureau as a whole. However, on April 30, 1923, general instructions were issued to all branches of the Bureau in Confidential Memorandum A. R. R. No. 3181, the pertinent portion of which reads as follows:

> The first two questions here presented were previously submitted to the Committee by the Unit with a request for advice as to whether or not the lessor corporation should include in its net income Federal Income and profits taxes payable by the lessee corporation and, if so, as to the correct method to be followed in computing such taxes. The Committee, at that time, thoroughly considered both questions and in A. R. M. 188 (dated October 10, 1922, unpublished) advised the Unit that such taxes were additional income to the lessor, and prescribed the method to be followed in computing such taxes, as follows:

"The lessor corporation at the close of its taxable year should without taking into account the amount of income and profits taxes paid in its behalf by the lessee corporation, determine what its gross income and net income are, then compute the amount of income and profits taxes properly assessable against a similar amount of income, accrue upon its books additional gross income in an amount equal to the taxes so computed and include such an amount in its return as additional gross income. The amount of income and profits taxes assessable against the lessor corporation is to be computed on the amount of net income shown in that return."

It was the purpose of these instructions to establish a consistent policy. If they have not been followed in individual cases, it is due to an unauthorized departure from the Bureau's instructions. It is, of course, true that there are cases still pending in the courts where the audit was made prior to the issuance of these instructions and where there has been no occasion for a reaudit since. Some of those cases may exhibit the same lack of uniformity which admittedly existed prior to the issuance of the general instructions above referred to.

It should be added that neither before nor since 1923 has any algebraic formula been used by the Bureau in computing the taxes.

Respectfully,

D. H. BLAIR, *Commissioner.*

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 130

OLD COLONY TRUST COMPANY, ET AL., EXECUTORS,

v.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE COMMITTEE ON FEDERAL TAXATION OF THE AMERICAN BAR ASSOCIATION AS AMICI CURIAE.

I.—AUTHORITY FOR SUBMISSION

This brief is filed by virtue of the authority granted by the Chief Justice in the letter to one of the submitting counsel dated January 22, 1929.

II.—THE QUESTION PRESENTED

This case comes to this Court from the United States Circuit Court of Appeals for the First Circuit upon certificate under section 239 of the Judicial Code.

This certificate reads in part: "This is a petition

to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. The Board of Tax Appeals found a deficiency in the Federal income tax of Mr. Wood in the year 1919 of $708,781.93, and for the year 1920 $350,837.14. The petition for review was duly filed pursuant to sections 1001 and 1002 of the Revenue Act of 1926 and rule 38 of this Court."

We are informed that upon oral argument of this case a doubt was expressed by certain members of this Court as to whether or not the provisions of the controlling statute permitting a review of a decision of the United States Board of Tax Appeals by the Circuit Courts of Appeals and this Court, are within the provisions of the Constitution, particularly section 2 of Article III.

III.—STATUTES INVOLVED

The pertinent portions of the Revenue Acts presumably are set forth in the supplemental briefs filed by the Solicitor General and by the attorney for the plaintiff.

IV.—PRELIMINARY STATEMENT

The creation of the United States Board of Tax Appeals by the Revenue Act of 1924 afforded an instrument furthering definiteness and certainty in the interpretation of the major Federal internal revenue laws. As an agency separate from the Treasury Department and the Bureau of Internal

Revenue, the Board was declared to have rendered decisions uninfluenced by administrative expediency and marked by independence of judgment. The Board assured the taxpayer a fair and open trial *before* his case was judged. (Hearings before the Committee on Ways and Means, House of Representatives, entitled Revenue Revision, 1925, p. 904.)

By the time the Revenue Act of 1926 was under consideration by the Congress, however, opportunity had been given to observe the working of those provisions of the Revenue Act of 1924 (§§ 274(b), 279(b), 308(b), 312(b) and 900(g)) with respect to the review proceedings in the Federal district courts which might follow a decision of the Board of Tax Appeals. The procedure whereby a taxpayer tried his case in a formal manner before the Board of Tax Appeals and then if unsuccessful paid the tax there determined and brought suit for refund before a Federal district court or the Court of Claims, was found to involve unnecessary duplication and expense. For the Commissioner of Internal Revenue, if unsuccessful before the Board of Tax Appeals, to try the case anew in the Federal district courts and to carry in such proceeding the burden of proof made an adequate review of the decision of the Board of Tax Appeals an arduous task for the Government. For either party the necessity of trying the matter all over again

seemed to be a step backward in a proceeding that should be determined as quickly as possible. Such a system was wasteful of time and unnecessarily expensive to the litigants. The district courts could not be expected to have the intimate knowledge of the taxing statutes possessed by the specialists on the Board of Tax Appeals.

The American Bar Association's Committee, which was the predecessor of the compilers of this brief, in company with representatives of the Treasury Department and others interested in prompt, orderly and just procedure for the collection of the Federal taxes, appeared before the Committees of Congress having the revenue bill of 1926 in charge. (Hearings before the Committee on Ways and Means, House of Representatives, entitled Revenue Revision, 1925, pp. 849-945.) The representatives of our Association urged a provision for a direct review of the Board's decisions by the Circuit Courts of Appeals. By such a procedure waste and delay would be minimized. The balancing judgment of tribunals more generally experienced than the Board of Tax Appeals would be more quickly applied to doubtful decisions of the Board. The ultimate decisions of this Court could be sooner reached in those cases which merited the attention of this Court.

The direct review by the Circuit Courts of Appeals, or the Court of Appeals of the District of Columbia, was provided for in the Revenue Act of

1926. (§§1001-1003.) Since the approval of that Act, petitions for review of 394 decisions of the Board of Tax Appeals have been filed. One hundred of these cases have been decided. The consequences of declaring invalid the laws under which these proceedings have been carried are indeed serious. Varying limitations will have run against the Government and taxpayer alike barring alternative relief. In the end, injustice and confusion must result.

Many members of our profession have appeared or are participating in the review proceedings as judges or as counsel. There is a general feeling that at last we have an orderly and logical procedure in the determination of tax disputes, which affords an adequate method of trial and final decision with reasonable promptness. Results are satisfactory. There have been no serious proposals for legislative changes. We present this brief with the hope that this Court will find it unnecessary to declare unconstitutional the statutory provisions which are producing sound practical results.

V.—EXPLANATION OF THE PART OF THE BOARD OF TAX APPEALS IN THE REVENUE COLLECTION SYSTEM

In order that the nature of the functions of the Board of Tax Appeals under present law, and of the courts in reviewing the decisions of the Board, may be presented accurately, it seems appropriate to outline the methods of collecting additional

taxes and the development of the statutory provisions involved. Effort is made to avoid lengthy quotations from or paraphrasing of the statutes, and in lieu thereof, to outline their legal effect.

(*a*) *Prior to enactment of Revenue Act of 1924*

Prior to the enactment of the Revenue Act of 1924, the method of collecting additional taxes, under the various income and profits tax Acts, was founded upon the recognized principle that the necessities of the Government justified an insistence upon prompt payment of the amount asserted by the administrative officer. A dispute over the amount due was not permitted to postpone payment. All controversies would be determined after payment, and necessary adjustments then made. A suit for refund could be instituted if the controversy were not settled administratively. An injunction to prevent collection, however, would not lie. (R. S., § 3224; see, for example, *Graham v. du Pont* (1923), 262 U. S. 234.) Judicial review of the administrative decision could be obtained only *after* payment.

(*b*) *Under the Revenue Act of 1924*

The "payment first" principle outlined above was probably reasonably satisfactory under tax laws imposing low rates. With the war, however, came the war revenue Acts imposing tremendous tax burdens and involving exceptionally complicated questions of law and fact. Bankruptcy, or

at least serious financial embarrassment, frequently followed compliance with an administrative demand for additional taxes. It was important and most desirable that there be some method by which the taxpayer could obtain an impartial determination of his tax liability, by a tribunal independent of the Treasury Department, *before* he should be compelled to pay an additional assessment. At the same time it was important that this method should not seriously interfere with the revenue needs of the Government. Accordingly, Congress in the Revenue Act of 1924 made important exceptions in the "payment first" principle. The following outlines the normal procedure under the 1924 Act (omitting unnecessary details of Bureau procedure).

(1) The taxpayer filed his return and paid the amount he computed as due;

(2) The Commissioner of Internal Revenue examined the return and determined the amount he considered as due;

(3) If the Commissioner, after conferences with the taxpayer and examinations, finally decided that an additional amount was due, he mailed the taxpayer a so-called "deficiency letter," setting out this fact;

(4) The taxpayer could then pay the amount and, if dissatisfied, file a claim for refund and, if necessary, bring suit for refund, or, at his option—

(5) The taxpayer could file a so-called "ap-

peal" with the Board of Tax Appeals, asking it to redetermine the amount due;

(6) In the latter case the Board would hear *de novo* evidence introduced by the taxpayer and by the Commissioner under prescribed rules of evidence, hear their arguments, consider their briefs, and reach an independent determination of the taxpayer's tax liability upon the entirely new record so made;

(7) If the Board determined that an additional amount was due, the taxpayer was then compelled to pay; or, if the Board determined that an additional amount was not due, the Commissioner was prohibited from collecting by the usual process of distraint;

(8) If the taxpayer was dissatisfied with the Board's determination, he could, after payment, bring suit for refund and obtain a judicial determination of his tax liability; or, if the Commissioner was dissatisfied, he could bring suit against the taxpayer. In either event, the suit in court was a *de novo* proceeding, in which the findings of fact of the Board were given *prima facie* effect only.

(*c*) *Under the Revenue Act of 1926*

As heretofore stated, two years' experience under the 1924 Act procedure proved that much time and money were wasted. After very thorough study, it was recommended that an oppor-

tunity be given for a final *court* determination of the tax liability *before* payment, if desired. Naturally, the method of obtaining the judicial review should be direct and effective.

The procedure adopted by the 1926 Act follows in general that outlined under the 1924 Act through paragraph (6), above—that is, until the decision of the Board of Tax Appeals. The judicial character of the record made in the Board is further confirmed by the requirement that the "rules of evidence applicable in courts of equity in the District of Columbia" shall be observed. (Revenue Act of 1926, §907 (b)). For purposes of convenient comparison, we will proceed with paragraph (7):

(7) Either the taxpayer or the Commissioner (or both) may obtain an immediate judicial review of the decision of the Board by filing a "petition for . . . review," in accordance with the rules of court. (Revenue Act of 1926, § 1001(a) and (b));

(8) The Board's decision may thereupon be reviewed by the appropriate Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, adequate provisions being made for the selection of the proper court. (Revenue Act of 1926, § 1002);

(9) The decision of the Court is subject to review by this Court in accordance with section 239

or 240 of the Judicial Code. (Revenue Act of 1926, § 1003(a));

(10) Upon review, the courts have power to affirm the decision of the Board or "if the decision of the Board is not in accordance with law" to modify or reverse it, with or without remanding the case for a rehearing. (Revenue Act of 1926, § 1003(b));

(11) The above method is the "exclusive" method of reviewing the decisions of the Board, and the judgment of the court is "final." (Revenue Act of 1926, § 1003(a));

(12) If it is finally determined that an additional amount is due, it is the specific, statutory duty of the Commissioner to enforce the collection of this amount. (Revenue Act of 1926, § 274(b));

(13) If it is finally determined that the taxpayer has already overpaid, it is the duty of the Commissioner to refund (or apply as a credit against an amount due for another year) the amount of the overpayment, subject, of course, to the period of limitations applicable thereto. (Revenue Act of 1926, § 284(e));

(14) A taxpayer who filed his petition with the Board after the passage of the Revenue Act of 1926 and exercises his privilege of obtaining a final judicial determination of his tax liability prior to payment, as above outlined, is forever barred from obtaining a refund of payments on

that liability, either by way of an administrative allowance of a claim, by a suit against the United States, or by a suit against the collector. (Revenue Act of 1926, § 284(d)). This limitation is subject only to a single exception necessary to give effect to the statute of limitations—i.e., if the period of limitation expires after the decision of the Board becomes final and prior to the collection of the amount determined to be due, the amount so collected is to be refunded or credited. (Revenue Act of 1926, § 284(d) (3)). Paragraphs (1) and (2) of section 284(d) merely afford judicial process, if necessary, to compel compliance with the decision of the Board. It is believed that this exception does not affect the legal finality of the decision of the Circuit Court of Appeals or of this Court upon a review of a decision of the Board of Tax Appeals.

The above outline presents the chronological steps, under the present law, in the collection of additional income or profits taxes. No change of importance in the present discussion was made by the Revenue Act of 1928. It is submitted that the present law provides an orderly, direct, and effective method for prompt and final determinations of tax liabilities, and that it provides a proper relief to taxpayers from the harsh results of a rigid application of the "payment first" principle.

(d) Effect of 1926 Act upon pending petitions

It is believed that a discussion of the effect of the provisions of the 1926 Act would be incomplete if its effect upon petitions pending at the time that Act became law were not explained. There were a large number of appeals which had been filed with the Board under the 1924 Act procedure and which had not been disposed of at the time of the enactment of the 1926 Act. It was necessary, of course, to provide for their disposition.

Because of the fact that the record in the Board proceeding had not been made with a view to a direct review, the 1926 Act provided that the future procedure in those cases in which the hearing had been had by the Board *before* the enactment of that Act should be the same as the procedure under the 1924 Act. (Revenue Act of 1926, § 283(j)). These cases, accordingly, are not involved in the present discussion.

As to the cases in which the petition was filed prior to the 1926 Act but which came on for hearing *after* the enactment of that Act, it was provided that the new method of judicial review should be applicable. (Revenue Act of 1926, § 283(b)). From the point of view of the Government, these cases, accordingly, are in exactly the same status as cases in which the petition is filed after the 1926 Act. In other words, the Government, in order to obtain a judicial review of

the Board's decision, must follow the direct method prescribed by the 1926 Act, and the final decision of the Board in such cases is absolutely binding upon it. The position of the taxpayer is also exactly the same with but one exception: It is specifically provided that the statutory prohibition upon an administrative or judicial refund is not applicable. (Revenue Act of 1926, §§ 283(b) and 284(d) (1)).

A determination of the legal position of a taxpayer who petitions for a direct review, however, requires a more detailed analysis. The statute merely *excepts* him from the specific *prohibition* upon a claim or suit for refund. Does it follow that the decision of the Circuit Court of Appeals, or of this Court, is not final and binding upon him? Can the Commissioner, notwithstanding the court decision, nevertheless allow his claim for refund? Or, if the Commissioner rejects his claim, may he then maintain a suit for a refund? It is submitted that the court's decision is just as final and binding as a decision of this Court, for example, in a suit for refund duly instituted prior to any statutory change in the procedure.

Before attempting to discuss the legal situation, it seems appropriate to point out the practical situation with which Congress was confronted. Taxpayer, had filed appeals with the Board at a time when the only legal effect of the action of the Board, insofar as a subsequent judicial review was

concerned, was that its findings of fact were merely *prima facie*. The 1926 Act afforded taxpayers an option to pay and bring suit for refund, or to petition the Board and obtain a final judicial determination before payment. Obviously, it would not have been fair to deprive the taxpayer who had filed his petition under the 1924 Act of his right to a suit for refund. It would seem that the *primary purpose* of the statutory provisions was to permit a taxpayer in this class to exercise his option *after* the decision of the Board—that is, permit him to determine then whether he preferred to pay the tax and attempt to obtain a refund in the ordinary course, or whether he preferred to obtain a judicial determination of his tax liability which would be as final and binding upon him as any other court decision.

In the first place, argument is not required to show that the Commissioner would not be authorized to allow his claim for refund. The Commissioner may refund or credit only in the case of an overpayment. (Revenue Act of 1926, § 284(a); a corresponding provision being found in the Revenue Act of 1924, § 281(a)). A payment in accordance with a final court decision could hardly be considered an "overpayment."

In the second place, section 1003(a) of the Revenue Act of 1926 provides that the judgments of the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia on review of

decisions of the Board "shall be *final*," except that they shall be subject to review by this Court. This means that such judgments are final under the ordinary principles of *res adjudicata*. The statute thus contemplates that any suit for refund based upon the same cause of action, involving the same parties, and involving the same issues which were raised or might have been raised, in the proceedings before the Board, is barred. (*Cromwell* v. *County of Sac* (1876), 94 U. S. 351; *Trozell* v. *Del. Lack. & West. R. R.* (1913), 227 U. S. 434; *United Shoe Mach. Co.* v. *United States* (1922), 258 U. S. 451. On the other hand, Congress apparently recognized that suits for refund might be brought which would be based upon a different cause of action or involve issues which could not have been raised before the Board, or between different parties. Such suits under the ordinary principles of *res adjudicata* would not be barred. *Sage* v. *United States* (1919), 250 U. S. 33; *Smietanka* v. *Indiana Steel Co.* (1921), 257 U. S. 1.) It would seem that a *secondary purpose* of the statutory provisions under discussion was to preserve the right to sue for refund in this latter type of case. There can scarcely be imputed to the Congress an intent to provide that a judgment in one suit should be final and at the same time authorize another suit between the same parties, based upon the same cause of action, and involving issues which were or might have been raised in the other

suit; particularly if such a provision would be repugnant to the Constitution and if the statute is susceptible of a reasonable construction which will avoid such a result.

VI.—ARGUMENT

Review of decisions of the Board of Tax Appeals is, as heretofore set forth, obtained by petition for review to the Circuit Courts of Appeals and the District of Columbia Court of Appeals (Revenue Act of 1926, §§ 1001 and 1003), with further review by this Court upon certificate or certiorari (Revenue Act of 1926, § 1003). It is, of course, elementary that this Court and the Circuit Courts of Appeals, as constitutional courts, are confined to the exercise of judicial power as derived from Article III of the Constitution. The exercise of the power to review decisions of the Board of Tax Appeals, it is submitted, is an exercise of such judicial power.

1. THE REVIEW PROCEEDINGS PRESENT A CASE OR CONTROVERSY IN THE CONSTITUTIONAL SENSE

A case or controversy to which the judicial power derived from Article III of the Constitution may extend, is present in the review proceedings for the reason that—

(*a*) *The parties are adverse in interest, there are actual controversies present and no attempt to secure an abstract determination or determination*

of a moot question, and the claims of litigants are presented in such regular proceedings as are established for the protection and enforcement of rights and for the prevention and redress of wrongs.

As applied to the present case, these propositions seem so obvious as to require no more than their statement.

(*b*) *The judgments are final and binding upon and enforceable against the parties.*

As heretofore pointed out in connection with the discussion of the part played by the Board of Tax Appeals in the reven system, the judgments of the Circuit Courts of Appeals and of the District of Columbia Court of Appeals upon the review of the decisions of the Board of Tax Appeals are final, for the Revenue Act of 1926 specifies that such judgments shall be final except that review by this Court may be obtained. Furthermore, the jurisdiction of the Circuit Courts of Appeals, the District of Columbia Court of Appeals and this Court is declared to be exclusive. (Revenue Act of 1926, § 1003). Again, the Revenue Act of 1926 (§ 284(d)) provides, with one exception not pertinent to the present discussion, that the taxpayer is barred from instituting suit in any court for recovery of a tax paid in pursuance of a decision of the Board of Tax Appeals. (The finality of the exceptional class of cases in

which a petition was filed with the Board of Tax Appeals prior to the passage of the Revenue Act of 1926 but decision reached thereafter, and the application of the doctrine of *res adjudicata* in connection therewith, has previously been discussed in this brief.)

The judgments of the Circuit Courts of Appeals, the District of Columbia Court of Appeals, and this Court upon review of decisions of the Board of Tax Appeals are binding upon and enforceable against the parties. In case judgment is rendered against the Commissioner, he is barred from collecting the deficiency asserted. In case judgment is rendered for the Commissioner, he is required to proceed to collect the amount of the deficiency by assessment and distraint or otherwise. (Revenue Act of 1926, § 274(b)). It is true that the judgment of the Board does not require the award of process of execution (that is, process of the Board or the Courts) to carry it into effect, but such process is not an indispensable adjunct to an exercise of judicial power. *Fidelity National Bank* v. *Swope* (1927), 274 U. S. 123, 132; *Tutun* v. *United States* (1926), 270 U. S. 568, 576-7; *La Abra Silver Mining Co.* v. *United States* (1899), 175 U. S. 423.

The case at Bar should be carefully distinguished from the situation presented in *Gordon* v. *United States* (1864), 117 U. S. 697; *United*

States v. *Ferreira* (1851), 13 How. 40; and *In re Sanborn* (1893), 148 U. S. 222. In those cases the judgment of the court was subject to revision by an executive officer and the enforcement of the court's judgment was subject to the discretion of the executive officer. In the case now before the Court, the executive officer can not revise the final decision, or execute it at his pleasure. It is his specific duty to execute the judgment.

The cases of *Gordon* v. *United States* and *In re Sanborn*, referred to in the preceding paragraph, were expressly distinguished in the *La Abra Silver Mining Company* case (175 U. S. 423, 456-7). The *La Abra Silver Mining Company* case was one in which this Court took jurisdiction under a statute in which its judgment was executed not by court process, but solely by mandatory executive action. The case involved the Act of December 28, 1892 (27 Stat. 409), under which the Attorney General was directed to bring suit in the Court of Claims against a mining company, to determine whether an award by a United States and Mexican Mixed Commission in respect of a claim by the company against Mexico, was obtained by fraud on the part of the company. If the court determined fraud was present, the President was authorized to return such money to Mexico. If the court determined that fraud was not present, the Secretary of State was directed to distribute the money to the company.

In this *La Abra Silver Mining Company* case it was held that the determination made by the Court of Claims under the above statute was a final and conclusive determination, and not merely ancillary or advisory, that the result of the affirmation by the Supreme Court of the decision of the Court of Claims would be that the mining company was barred from all claims on account of the award of the Commission, and that the result of a reversal of the decision of the Court of Claims by the Supreme Court would be that it then became the absolute duty of the State Department to distribute the money to the company. The case presents a situation in which a judgment was not enforceable by execution of the tribunal rendering the decision and yet the power exercised was judicial power and the decision could be reviewed by a constitutional court.

The effect of the judgment was merely to give rise to the contingency upon which there came into operation one or the other of two statutory duties imposed upon Government officers, namely, to distribute or not distribute particular funds. For the carrying out of its decision the court was required to rely upon the performance by an executive officer of his statutory duty. This is the same situation as presented by the dependence of the Board of Tax Appeals upon the Commissioner of Internal Revenue for the performance of his statutory duty in carrying out the judgment of the

Board. In this respect then we are entitled to consider the final decisions of the Board of Tax Appeals resulting from the decisions of the Circuit Courts of Appeals as meeting the requirement of a "case or controversy."

2. THE REVIEW PROCEEDINGS ARE NOT ADMINISTRATIVE IN CHARACTER

Doubt as to whether the review of the determination of an administrative tribunal is in itself an administrative determination and not an exercise of judicial power may exist. Any such doubt would seem, however, to be based upon the assumption that review proceedings partake of the nature of the original proceedings. It is submitted that this is a false assumption. The question is, does the action required of the courts upon review permit only of the exercise of judicial power derived from Article III of the Constitution.

A statutory method for the review of an administrative determination merely prescribes the *procedure* by which the judicial review required by the Constitution or deemed advisable by the legislature (to the extent permitted by the Constitution) is obtained. If no method were prescribed by statute, the necessary review would be obtained by an original proceeding *de novo*, such as a suit at common law, one of the extraordinary legal remedies, or a proceeding in equity. It is quite immaterial what method is to be followed, *so long*

as a case or controversy is presented to the courts requiring or permitting only the exercise of judicial powers.

Familiar examples in Federal administrative law of statutory methods of review are found in the Federal Trade Commission Act, the Packers' and Stockyards Act, and the collection of customs revenues, each of which is outlined hereinafter. In the absence of a direct method prescribed by statute, the Federal courts, for example, review by injunction proceedings the rate-making decisions of the Interstate Commerce Commission; by mandamus, the refusal of the Commissioner of Internal Revenue to certify for payment an amount due; by habeas corpus, the decisions of the Secretary of Labor in immigration proceedings; by suit for damages, the reparation awards of the Interstate Commerce Commission. It is not believed necessary to enter into an extended discussion of this question. The constitutional propriety of the courts taking jurisdiction to review such administrative actions is now unquestioned. The reason for this lies in the fact that the review proceedings are so confined as to present for the determination of the courts only cases or controversies permitting the exercise of judicial powers. They do not, as in *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693; and *Williamsport Wire Rope Co.* v. *United States* (1928), 277 U. S.

551, require the revision by the courts of an administrative discretion exercised by the executive or administrative officer or agency.

Furthermore, in this case, the decision reviewed (although a decision of an independent tribunal in the executive branch of the Government) is a decision judicial in character. *Blair* v. *Oesterlein Machine Co.* (1927), 275 U. S. 220, 226-7; H. Rept. 1, 69th Cong., p. 20; H. Rept. 2, 70th Cong., pp. 30-31; S. Rept. 960, 70th Cong., p. 38. Decisions of the Board of Tax Appeals declare liabilities as they stand on present or past facts under law supposed already to exist and are the basis for the enforcement of such liabilities. The decisions are, therefore, judicial in their nature. *Prentis* v. *Atlantic Coast Line Co.* (1908), 211 U. S. 210, 226. The record of proceedings therein is in form the same as a court record; no evidence becomes a part of the record (unless by stipulation) without being offered by one party during the trial, with an opportunity afforded to the other party to test its legal admissibility by the same method as is used in court. Decisions of the Board of Tax Appeals are obviously not legislative in character. Neither are they, as in the case of reparation awards of the Interstate Commerce Commission or the determinations of the Federal Trade Commission, non-binding and unenforceable (save by virtue of subsequent judicial proceedings) and therefore merely quasi-judicial in character. On

the contrary, decisions of the Board of Tax Appeals that have become final are, as hereinbefore set forth, binding and enforceable without resort to the courts. The proceedings before the Board are, as has been said by this Court and by the Congress, judicial in character. In consequence, even upon the assumption that the review proceedings partake of the nature of the original proceedings below, it is submitted that the review proceedings do not attempt to impose non-judicial functions upon constitutional courts.

Incidentally, while the decisions of the Board of Tax Appeals are judicial in character, the judicial power exercised is, of course, not that drawn from Article III of the Constitution. Territorial courts, District of Columbia courts, and special tribunals created to determine judicial questions arising between the United States as a sovereign government and private individuals, with reference to the exercise of sovereign powers in connection with governmental revenue, grants, debts, military forces, duties towards Indian tribes, and the like, exercise judicial powers drawn from sources other than Article III of the Constitution. *American Insurance Co.* v. *Canter* (1828), 1 Pet. 511, 546; *United States* v. *Ferreira* (1851), 13 How. 40, 48; *Dynes* v. *Hoover* (1858), 20 How. 65, 79; *Reynolds* v. *United States* (1878), 98 U. S. 145, 154; *The City of Panama* (1879), 101 U. S. 453, 460; *United States* v. *Winona & St. P. R. Co.*

(C. C. A. 8th, 1895), 67 Fed. 948, 955; *In re Jessie's Heirs* (D. C. Okla., 1919), 259 Fed. 694, 699; *United States* v. *McDonald* (1920), 265 Fed. 754, 759-60. Of most persuasive importance in this connection is the opinion in volume 68 of the Congressional Record on page 3181.

In the case of the Board of Tax Appeals, its powers are drawn from the authority to create and empower tribunals in connection with the exercise of the sovereign power of laying and collecting taxes, and, if deemed necessary, such additional Congressional authority as is found in the power of Congress under Article I, section 8, paragraph 9, of the Constitution to create tribunals inferior to the Supreme Court, or under Article I, section 8, paragraph 18, of the Constitution to make all laws necessary and proper to carry into execution the specific powers of Congress.

The territorial courts, District of Columbia courts, and special tribunals, such as those above described, may be vested with non-judicial powers as well as powers judicial in character. *Gordon* v. *United States* (1864), 117 U. S. 697; *In re Sanborn* (1893), 148 U. S. 222; *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693; 68 Cong. Rec. 3181-2.

In the case of the Board of Tax Appeals, these powers non-judicial in character are illustrated

by the Board's power to revise the discretion exercised by the Commissioner of Internal Revenue in matters of special assessments. *Blair* v. *Osterlein Machine Co.* (1927), 275 U. S. 220; *Williamsport Wire Rope Co.* v. *United States* (1928), 277 U. S. 551. Even in these matters it may well be that a decision of the Board is reviewable by the courts in order to correct arbitrary action of the Board or errors of law, for example. However, such a decision is not involved in the instant case, and the extent to which such a decision may be reviewed may properly be determined when a case involving the question is presented.

The fact that the Congress was fully appreciative of the problems involved is revealed in the Committee Reports. In the report of the Committee on Finance of the United States Senate upon the Revenue Act of 1926 (S. Rep. No. 52, 69th Cong., pp. 36-7), the Committee said:

> *Court review—Questions of fact and law.*—The procedure for review of determinations of the board is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the Packers and

Stockyards Act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of section 1003 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 of the revenue act of 1924 as amended in the pending bill and subdivision (b) of section 1003 of the pending bill). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunc-

tion, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The principles discussed in the preceding paragraph are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, as in the importation of merchandise and the admission of aliens. In adhering to such principles the committee is of the opinion that it is establishing an appellate procedure that is unquestionably constitutional.

> Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

A similar statement was made in the Report of the Committe on Ways and Means of the House of Representatives upon the same Act. (H. Rept. No. 1, 69th Cong., pp. 17-21.)

3. LEGISLATIVE PRECEDENTS

(a) *Board to settle private land claims in California and Commission to the Five Civilized Tribes.*

Congress in the case of the Board of Commissioners to settle private land claims in California (9 Stat. 631, amended 10 Stat. 99) and in the case of the Commissionto the Five Civilized Tribes (29 Stat. 339) provided for direct appeals from these administrative agencies to a Federal district court (a constitutional court) and to the United States court for Indian territory (a legislative court) respectively. Appeals to the lower courts were *de novo*. In *United States* v. *Ritchie* (1855), 17 How. 525, 533, and in *Stephens* v. *Cherokee Nation* (1899), 174 U. S. 445, 477, respectively, the constitutional validity of appeals *de novo* from

these administrative agencies to the lower courts was sustained. This court, however, considered the proceedings in the lower courts as original and the term "appeals" a misnomer.

In *United States* v. *Coe* (1894), 155 U. S. 76, this Court considered the constitutionality of the provisions of the Act for the establishment of a court of private land claims (26 Stat. 854), authorizing a direct appeal to this Court, and directing this Court to retry the cause and authorizing this Court to take additional testimony therein. In the *Coe* case, as well as in the *Ritchie* case, this Court said that the tribunals in question exercised judicial power drawn from sources other than Article III of the Constitution. In the *Coe* case the Court held that the appellate procedure providing for appeals to a constitutional court (this Court), was constitutionally valid as an appellate procedure. However, in the earlier *Ritchie* case, this Court held the appeals to a constitutional court (a Federal district court) valid only as an original and not as an appellate procedure. The only obvious distinction is that the Congress designated the tribunal in the *Coe* case as a court and the tribunal in the *Ritchie* case as a board. Counsel are not aware of any substantial differences in the organization or powers of the two tribunals, and it seems difficult to believe that for constitutional purposes it is necessary that mere unsubstantial variations in Congressional nomenclature

should be considered. In any event, it must be noted that in both instances, this Court recognized the constitutional validity of the review by a constitutional court, both in matters of law and fact, of determinations of tribunals exercising judicial power flowing from sources other than Article III of the Constitution.

(b) Federal Trade Commission and Secretary of Agriculture.

Under the Federal Trade Commission Act (38 Stat. 717) cease and desist orders of the commission are not judicial in character as in the case of the decisions of the Board of Tax Appeals for the reason that the Commission enters no binding judgment but merely an order which is enforceable only on application to and adjudication by a Circuit Court of Appeals. If any person fails or neglects to obey the cease and desist order, the Commission may apply to the Circuit Court of Appeals for the enforcement of its order. On the other hand, the person to whom the order is directed may, in lieu of merely awaiting action of the Commission, petition the Circuit Court of Appeals to set aside the order. A transcript of the record of the proceeding before the commission, including testimony taken and report and order of the commission, is filed with the Circuit Court of Appeals. The Act provides that the find-

ings of the commission as to the facts, if supported by testimony, are conclusive.

The Circuit Court of Appeals has power to enter a decree affirming, modifying, or setting aside the order of the commission upon the pleadings, testimony, and proceedings set forth in the transcript. The Circuit Court of Appeals may direct additional evidence to be taken before the commission if there is shown to its satisfaction that the additional evidence is material and that there were reasonable grounds for failure to produce it in the proceeding before the commission. Section 5 of the Federal Trade Commission Act, 38 Stat. 717. Similar powers are also vested in the Interstate Commerce Commission, the Federal Reserve Board, the Federal Trade Commission under section 11 of the Clayton Act, 38 Stat. 730. While the review of proceedings is not by direct appeal, it has been referred to by this Court as appellate and advisory in character even though the functions of the Commission are characterized as merely administrative and not judicial. *The Federal Trade Commission* v. *Eastman Kodak Co.* (1927), 274 U. S. 619.

In Title II of the Packers and Stockyards Act of 1921, sections 203-5, the Congress obviously followed the Federal Trade Commission procedure, with the modification that the review the Circuit Court of Appeals would be had by direct appeal and that the provision for the conclusive-

ness of the findings, if supported by testimony, is omitted. Further, any cease and desist order of the Secretary which has become final, either as a result of a failure to appeal or after appeal, is enforceable by criminal penalty for its violation and in addition, if the courts have affirmed or modified the order, the decree of affirmation or modification operates as an injunction against the further violation of the order.

(c) The Board of General Appraisers.

By the Customs Administrative Act of 1890 (26 Stat. 136, §§ 12-18) there was created a board of nine general appraisers. Members of the Board were not appointed for a specific term and were removable by the President for such cause as he deemed sufficient. *Shurtleff* v. *United States* (1903), 189 U. S. 311. Members of the Board were to act in divisions at such ports and within such territorial limits as the Secretary of the Treasury might prescribe. All their powers and duties were to be exercised "under the general direction of the Secretary of the Treasury."

The Board had jurisdiction to examine and decide cases arising as to the dutiable value of merchandise and the decision of the Board in the case was final and conclusive and not subject to review. It was the duty of the collector of customs to ascertain, fix, and liquidate the rate and amount of duties to be paid on the merchandise and the duti-

able costs and charges thereon in accordance with the value fixed by the Board. Further, the Board had jurisdiction to examine and decide cases as to the rate and amount of duties chargeable upon imported merchandise and its decision thereon was final and conclusive except that a review thereof might be had in a Circuit Court of the United States (subsequently in a Circuit Court of Appeals of the United States) upon questions of law and fact. The procedure in such review, prescribed in § 15 is in effect the same as the procedure by which a record and decision of the Board of Tax Appeals goes to the Circuit of Appeals for review. Appeal from the Circuit Court decision might be had to the United States Supreme Court. The collector of customs was required to liquidate the entry in accordance with any such final decision.

The Board had authority to administer oaths, to cite persons to appear, and to require the production of papers. Failure to appear or to produce papers in accordance with the Board's citation or requirement constituted an offense subject to a penalty of $100, to be imposed in independent court proceedings.

Subsequently, by the Act of May 27, 1908 (35 Stat. 406), members of the Board of General Appraisers were to hold office during good behavior subject to removal by the President for cause, were invested with the powers of the Circuit

Courts of the United States in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt, and by the Tariff Act of 1909 (36 Stat. 99) were given power to establish rules of evidence, practice, and procedure. By the Tariff Act of 1913 (38 Stat. 186) the Board was authorized to exercise "both judicial and inquisitorial functions" in determining dutiable value.

In 1926 Congress changed the name of the Board to "United States Customs Court" although the immunities, tenure of office, powers, duties, rights, and privileges of the members of the Board and jurisdiction, powers, and duties of the Board were to remain the same as under existing law. 44 Stat. 669. Subsequently in the same year, in connection with the Judges Salary Bill (44 Stat. 919, 920), Congress referred to the tribunal as the Board of General Appraisers "which functions as a customs trial court."

Whether the legislation enacted in 1908 and thereafter changed the status of the Board is a disputed point. Cf., 31 Op. Atty. Gen. 577, 588; *United States v. Stone & Downer Co.* (1927), 274 U. S. 225, 232; *United States* v. *Schwartz & Co.* (1912), 3 Ct. Cust. App. 24, 32; *United States* v. *Kurtz* (1914), 5 Ct. Cust. App. 144, 146; *Fougera & Co.* v. *United States* (1919), 9 Ct. Cust. App. 284; 27 T. D. 63; 38 T. D. 712; 40 T. D. 404. The determination of that question, however, is

believed to be immaterial to the present argument.

During the period from 1890 to 1908 the status of the Board of General Appraisers was in all essentials similar to that of the Board of Tax Appeals today. In comparing the two agencies we find (1) the members of both appointed by the President for less than life terms and removable by the President in his discretion, (2) the determination of both subject to appeal to constitutional courts with the exception that determinations of the Board of General Appraisers on dutiable value are not appealable and that determinations of the Board of Tax Appeals are appealable on question of law only, (3) neither agency specifically given power to punish for contempt but compelled to resort to the courts for the enforcement of its subpœnas, (4) both agencies in the Executive Branch of the Government, though the Board of Tax Appeals is independent of the Treasury Department while the Board of General Appraisers was under the general supervision of the Secretary of the Treasury (26 Stat. 136, § 12; 21 Op. Atty. Gen. 85), and (5) both tribunals dependent upon the Treasury Department for the execution of their judgments.

The Board of General Appraisers, during the period in question, was considered by the courts as exercising judicial power. *In re Van Blankensteyn* (C. C. A. 2nd, 1892), 56 Fed. 474, 477; *Marine* v. *Lyon* (C. C. A. 4th, 1895), 65 Fed. 992,

994; *United States* v. *Lies* (1898), 170 U. S. 628, 636. During all that period no objection was raised to the validity of the legislation creating and empowering the Board and providing for the review of its determination, although numerous cases involving decisions of the Board went to the Federal courts and many of them to this Court.

Under the existing law appeals in certain cases may be taken from the Board of General Appraisers (United States Customs Court) to the United States Court of Customs Appeal and from such court to this Court by certificate for review and determination issued upon certiorari or otherwise. Judicial Code, § 195; Tariff Act of 1922, § 515. This procedure by direct appeal from the Board of General Appraisers was undoubtedly familiar to the Committee on Ways and Means and the Committee on Finance, each of which considers both internal revenue and tariff matters.

VII.—CONCLUSION

It is submitted that the procedure prescribed by the Revenue Act of 1926 for a direct and final judicial determination of tax liabilities presents a case or controversy within the meaning of the Constitution, requires of the courts the exercise of judicial powers only, and does not attempt to impose non-judicial functions upon the courts.

Respectfully submitted,

THE COMMITTEE ON FEDERAL TAXATION
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(This committee acknowledges its very great indebtedness to Messrs. Ellsworth C. Alvord and Frederic P. Lee, of counsel.)

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No. 130

In the Supreme Court of the United States

OCTOBER TERM, 1928.

OLD COLONY TRUST COMPANY, ET AL, EXECUTORS,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

SUBSTITUTE BRIEF ON REARGUMENT OF THE COMMITTEE ON FEDERAL TAXATION OF THE AMERICAN BAR ASSOCIATION AS AMICI CURIAE

I—AUTHORITY FOR SUBMISSION

This substitute brief is filed by leave of court granted March 5, 1929. The brief is to be substituted for that previously filed under authority granted by the Chief Justice in his letter of January 22, 1929, to one of the submitting counsel.

II—STATEMENT OF THE CASE

The statement of facts in the certificate of the United States Circuit Court of Appeals for the First Circuit as amended in conformity with the order of this Court of February 18, 1929, reads as follows:

"Question of Law Certified by the United States Circuit Court of Appeals for the First Circuit to the Supreme Court of the United States May 2, 1928.

"This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, the Commissioner of Internal Revenue notified Mr. Wood by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The amount of this deficiency was revised by the Commissioner's letter of August 18, 1925. On August 22, 1925, an appeal was taken to the Board of Tax Appeals. In response to an order to make petition more definite and certain, an amended petition was filed October 27, 1925. The hearing before the Board of Tax Appeals was held April 11, 1927, and the decision of the Board of Tax Appeals was rendered November 12, 1927. The Board of Tax Appeals approved the action of the Commissioner and found a deficiency in the federal income tax of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review in this Court of the decision of the Board of Tax Appeals, pursuant to the Revenue Act of 1926 and Rule 38 of this Court, was perfected December 23, 1927.

"William M. Wood was president of American Woolen Company during the years of 1918, 1919, and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his Federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.87, which he included in his Federal income tax return for 1919.

"August 3, 1916, the American Woolen Company duly adopted the following resolution, which was in effect in 1919 and 1920:

> 'Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines, and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation.'

"This resolution was amended on March 25, 1918, as follows:

> 'Voted: That, referring to the vote passed by this board on August 3, 1916, in reference to income taxes, State and Federal, payable upon the salaries or compensation of the officers and certain employees of this company, the method of

computing said taxes shall be as follows, viz.:

"'"The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company."'

"Pursuant to these resolutions the American Woolen Company paid to the collector of internal revenue Mr. Wood's Federal income and surtaxes due to salary and commissions paid him by the Company as follows:

Taxes for 1918 paid in 1919	$681,169.88
Taxes for 1919 paid in 1920	351,179.27

"The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920."

Then follows the question of law certified.

III—ASSIGNMENT OF QUESTIONS FOR REARGUMENT

In its order of February 18, 1929, restoring this case to the docket for reargument, the Court requested assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court ques-

tions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

IV—SCOPE OF BRIEF

This brief deals solely with the jurisdictional points presented by paragraphs 1 and 2 above. It does not deal with the questions presented by paragraphs 3 and 4.

V—STATUTES INVOLVED

The pertinent portions of the Revenue Acts are set forth in Appendix A to this brief.

VI—PRELIMINARY STATEMENT

Prior to the Revenue Act of 1924 the necessity for prompt collection of Federal taxes was held to warrant the requirement of payment first with litigation postponed until after payment. No injunction would lie to prevent the collection of the amount of tax as demanded by the administrative officers. R. S. §3224. This policy when applied to the conflicting laws and huge amounts involved in the war tax legislation resulted in undue hardships. Congress, therefore, determined as a measure of relief that the taxpayer should, *before* being com-

pelled to pay any asserted deficiency in tax, be afforded an opportunity to obtain an impartial determination of his tax liability by a tribunal independent of the Treasury Department.

The simplest method of providing for such impartial determination prior to payment would have been the repeal of R. S. §3224, thereby permitting judicial review by injunction proceedings. However, the imposition upon the Federal judicial system of many thousands of tax cases (43,413 cases have been instituted before the Board of Tax Appeals to date) would either have overburdened the already heavily laden judiciary or required the creation of numerous additional judgeships. Such a course might also have produced great delay in the collection of the revenues. Congress therefore accorded the taxpayer the opportunity of impartial determination before payment by creating an agency which could settle without undue delay the large number of tax cases the decision of which depended primarily upon questions of fact rather than upon fundamental differences of law. This was accomplished by the Revenue Act of 1924 and the agency was denominated the Board of Tax Appeals.

By the time the Revenue Act of 1926 was under consideration there had been opportunity to observe the operation of those provisions of the Revenue Act of 1924 with respect to review by the Federal district courts of determinations of the Board of Tax Appeals. Under the 1924 Act the procedure required that the taxpayer unsuccessfully petitioning the Board should pay the tax determined by that body and bring suit in a Federal dis-

trict court or the Court of Claims. Under the 1924 Act also the Commissioner of Internal Revenue, if unsuccessful before the Board, was required to try the case anew in a Federal district court and therein carry the burden of proof. This process of repeating a formal trial was wasteful of time, unnecessarily expensive, and in those cases in which the Government was the loser before the Board, arduous indeed.

The American Bar Association's Committee, which was the predecessor of the compilers of this brief, in company with representatives of the Treasury Department and others interested, urged a provision for a direct review of the Board's determinations by the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia. See hearings before Committee on Ways and Means, House of Representatives, Revenue Revision 1925, pp. 849-945. Congress, cognizant of the situation, in passing the Revenue Act of 1926 provided an opportunity for direct review of the decisions of the Board of Tax Appeals upon a petition for review to the Circuit Courts of Appeals or the Court of Appeals of the District of Columbia with an opportunity to reach this Court by certiorari or certificate.

Review of 610 decisions of the Board of Tax Appeals had been sought by March 31st last. Of these 173 had been decided by that date. See Appendix B of this brief. The consequences of declaring invalid the laws under which these proceedings have been and are being prosecuted, would be serious. Varying limitations will have run against the Government and taxpayers barring alter-

native relief. Widespread confusion and injustice would seem inevitable if these proceedings have been unlawful.

There is a general feeling that at last we have an orderly and logical procedure in the determination of tax disputes, a procedure affording an adequate method of trial and final decision with reasonable promptness. There has been no serious proposal for legislative changes. Results are satisfactory.

VII—ARGUMENT

FIRST QUESTION:

WAS THERE POWER IN CONGRESS TO CONFER JURISDICTION UPON THE CIRCUIT COURTS OF APPEALS TO REVIEW ACTION BY THE BOARD OF TAX APPEALS?

IT IS SUBMITTED:

THAT CONGRESS HAS POWER TO CONFER JURISDICTION ON THE CIRCUIT COURTS OF APPEALS TO REVIEW ACTION BY THE BOARD OF TAX APPEALS.

It is believed that the validity of the legislation conferring jurisdiction upon the Circuit Courts of Appeals to review action of the Board of Tax Appeals depends upon whether such action when presented to the court for review is presented in the form of a case or controversy permitting the exercise of the judicial power within the meaning of Article III of the Constitution.

A—ELEMENTS OF A CASE OR CONTROVERSY

The requisite elements for a case or controversy, as set forth in decisions of this Court, are—

1. That the parties must be adverse in interest; that the controversy must be actual, not moot; and that the plaintiff must have a substantial interest, definite and

specific, in the question to be adjudicated. *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.* (1892), 145 U. S. 300, 301; *Fairchild* v. *Hughes* (1922), 258 U. S. 126, 129; *Massachusetts* v. *Mellon* (1923), 262 U. S. 447, 488; *New Jersey* v. *Sargent* (1926), 269 U. S. 328, 333; *Muskrat* v. *United States* (1911), 219 U. S. 346, 356; *Texas* v. *Interstate Commerce Commission* (1922), 258 U. S. 158, 162.

2. That the claims of the litigants must be presented in such regular proceedings as are established by law for the protection and enforcement of rights or the prevention or redress of wrongs. *Muskrat* v. *United States* (1911), 219 U. S. 346, 356; *Liberty Warehouse* v. *Grannis* (1927), 273 U. S. 70, 74; *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447, 475, 477; *Willing* v. *Chicago Auditorium* (1928), 277 U. S. 274, 289.

3. That the judgment of the court must be final. *Gordon* v. *United States* (1864), 117 U. S. 697, 702; *United States* v. *Ferriera* (1851), 13 How. 40, 47; *In re Sanborn* (1893), 148 U. S. 222, 224.

4. That the question sought to be determined must not be administrative. *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428, 444; *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693, 698.

B—OUTLINE OF PROCEDURE FOR REVIEW OF DECISIONS OF THE BOARD

The ascertainment of whether the above elements are present in the usual proceeding for review of action by

the Board of Tax Appeals demands preliminary consideration of the character of the procedural steps provided by law both for action by the Board and the review thereof by the courts.

1. Procedure Before the Board.

The procedure before the Board for redetermination upon petition of a taxpayer of a deficiency asserted by the Commissioner of Internal Revenue, is fully set forth in the statement made by the Chairman of the Board of Tax Appeals and incorporated in this brief as Appendix B to this brief. The Court is most earnestly requested to refer to this statement as it presents a concise authoritative account of the essential features of the Board's procedure and operations.

2. Court Rules for Review.

The procedure for review of decisions of the Board of Tax Appeals is provided for in part by specific provisions in the Revenue Act of 1926, §§1001-5, and in part by rules of the Circuit Courts of Appeals promulgated pursuant to authority granted by section 1001(b) of that Act to adopt rules for the filing of a petition for review, the preparation of the record for review, and the conduct of proceedings upon review. The essential feature of the review proceedings is that the Circuit Courts of Appeals are confined to the record made before the Board of Tax Appeals. This is readily observed from a consideration of the rules themselves which are here set out:

> "I. Every petition for review of a decision of the United States Board of Tax Appeals shall set

forth briefly the nature of the controversy, shall declare the court in which review is sought, shall contain assignments of error separately stated and numbered in respect of each and every error asserted and intended to be argued, and shall be verified by the petitioner or his attorney of record.

"II. If error is assigned in the admission or rejection of evidence, or on the ground that a finding of the Board is unsupported by any evidence, a statement of the evidence submitted to the Board shall be prepared by the petitioner. Such statement shall contain in narrative form the evidence material to the assignments of error, and shall be prepared by the parties and settled by a member of the Board in accordance with the general Equity Rules promulgated by the Supreme Court of the United States.

"III. The party applying for review shall file his petition with the clerk of the Board of Tax Appeals, and serve a copy thereof with notice of filing on the opposite party or parties. The review shall be taken by such filing and notice.

"IV. Within sixty days from such filing and notice, the statement of evidence, if any, shall be prepared and filed, and the clerk of the Board of Tax Appeals shall transmit and deliver to the Clerk of this Court copies duly certified as correct of the following documents:

1. The docket entries of proceedings before the Board.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review.

5. Statement of evidence, if any, as settled or agreed upon.

"The time for such [1] transmission and delivery of documents may be enlarged by a member of the Board or a judge of this court, and all such orders of enlargement shall forthwith be filed with the Clerk of the Board of Tax Appeals and certified copies thereof be sent to this court with the above enumerated documents.

"V. If such certified copies are not delivered to the Clerk of this Court with sixty days from said filing and notice or before the expiration of the time enlarged by order, a motion to dismiss the petition for delay may be made, and shall be granted unless good cause be shown for the delay."

See Vol. I, Digest United States Supreme Court Reports, pp. 228-9.

3. Extent of Court Review.

The character of the review permitted by the Circuit Courts of Appeals is specified in the Revenue Act of 1926, §1003(b), which provides—

> Upon such review, such courts shall have power to affirm or, *if the decision of the Board is not in accordance with law*, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (Italics ours.)

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[1] At this point the Circuit Courts of Appeals for the First, Second, Third, and Fourth Circuits have inserted the words "preparation of evidence and".

4. Procedure of Court Upon Review

The Circuit Courts of Appeals treat decisions of the Board of Tax Appeals before them for review in the same manner as a verdict of a jury on a writ of error (*Avery* v. *Commissioner of Internal Revenue* (1927, C. C. A. 5th), 22 F. (2d) 6, 7), or the review of a law case in which the jury has been duly waived. *Conklin-Zonne-Loomis* v. *Commissioner of Internal Revenue* (1928, C. C. A. 8th), 29 F. (2d) 698, 700. The judgment of a Circuit Court of Appeals upon review of the Board's decision "shall be final" except that the judgment is subject to review upon certiorari or certificate to this Court. Revenue Act of 1926, §1003(a).

The judgment of the reviewing court and the mandate pursuant thereto are binding upon the Board and, if necessary, the Board's decision is reversed or modified to conform to such judgment and mandate. The issues in the proceeding having been determined, the ministerial duty of computing the amount of the deficiency or overpayment in accordance with the determination is performed, and final decision of the Board entered. See Rule 50 of the Rules of Practice before the United States Board of Tax Appeals, attached as a part of Appendix B of this brief.

The review procedure as above set forth is exclusive. Revenue Act of 1926, §1003(a).

C—THE REVIEW PROCEEDING PRESENTS A CASE OR CONTROVERSY BEFORE THE CIRCUIT COURT OF APPEALS

The proceedings for review of a decision of the Board of Tax Appeals present for the consideration of the Cir-

cuit Court of Appeals a case or controversy permitting the exercise of judicial power within the meaning of Article III of the Constitution.

1. Parties Actually Adverse—Substantial Interest and the Actual Controversy Are Present in the Review of Board Decisions

It is clear that the first group of the elemental requisites to a case or controversy are present in the matter now before the Court. The taxpayer and the Commissioner of Internal Revenue are adverse in their interests. The controversy is actual and not moot because the dispute is based upon existing facts, determines present rights, and is not abstract. The plaintiff has a substantial interest in the question to be adjudicated that is definite and specific. In fact, that interest will ultimately be computed in dollars and cents.

The presence of the other elements of a case or controversy, however, requires more extended consideration.

2. Claims of the Litigants are Presented in Regular Proceedings Subject to Judicial Cognizance.

The proceedings for review of decisions of the Board of Tax Appeals are established by law and rules of court pursuant thereto. They afford a remedy in some respects similar to that formerly existing when tax questions were reviewable in injunction proceedings. Under the Board of Tax Appeals procedure administrative officers are restrained from further collection of the tax pending deci-

sion by the Board of Tax Appeals and opportunity of review thereof by the Federal courts. That restraint becomes permanent unless removed by final decision of the Board conforming, if necessary, to modifications thereof by the judgment and mandate of the reviewing court.

But irrespective of any analogy, the Congress may, whenever it deems it proper, bring within the cognizance of the courts matters involving public rights, such as taxation, which are susceptible of judicial determination. The form of the proceeding lies within the Congressional discretion so long as it is one through which the judicial power is capable of acting. *Murray's Lessee* v. *Hoboken Land Improvement Company* (1855), 18 How. 272, 284. The sovereign in consenting to have its public rights adjudicated may designate the form of the proceeding and may avail itself of the national courts so long as the form of the proceeding presents an actual case or controversy susceptible of final determination by the judicial power.

3. THE JUDGMENT OF THE COURT IS FINAL.

The Judgments of the Courts are Binding upon the Parties.—"Final" is the term applied by the statute to the judgments of the courts upon review of the decisions of the Board of Tax Appeals. "Exclusive" is used to describe the jurisdiction of the courts designated to review the decisions. Revenue Act of 1926, §1003(a). These provisions apply to all classes of cases. There are no exceptions. If it is finally determined that the taxpayer

owes an additional amount to the Government, the Commissioner of Internal Revenue is under the specific statutory duty to proceed to collect the amount. If it is finally determined that no deficiency is due, the Commissioner is barred from attempting to collect. If it is finally determined that the taxpayer has made an overpayment, it is the specific statutory duty of the Commissioner to make the appropriate refund or credit. These terms must mean, among other things, that the judgments are final in the sense that the ordinary principles of *res judicata* render decisions final. The finality required by the Constitution certainly is not greater than that resulting from the application of the doctrine of *res judicata*.

Some confusion seems to have arisen as to the legal effect of sections 284(d) and 283(b) of the Revenue Act of 1926. It is submitted that an examination of these provisions will demonstrate conclusively that they do not affect the finality of the judgments.

At the time the Revenue Act of 1926 was under consideration by the Congress, questions had arisen as to the application of the doctrine of *res judicata* in tax cases. What were different causes of action—was the entire tax liability for a particular taxable period *one* cause of action, or did each of the various issues involved present a different cause of action? If a suit between the Commissioner and a taxpayer had been decided, could the taxpayer maintain a second suit upon the same issues against the United States or against a Collector of Internal Revenue? Was the doctrine that a collector and the United States were "different parties" to be continued?

These questions were definitely settled by the Congress as to the future. Section 284(d) of the Revenue Act of 1926 specifically provides that if a taxpayer, after the enactment of the 1926 Act, files a petition with the Board of Tax Appeals, then—

> no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court * * *

This specific statutory requirement that the entire tax liability for a given taxable year must be settled once and for all in the one proceeding, is not applicable to cases, such as the one now at bar, filed with the Board under the Revenue Act of 1924. The situation causing Congress to adopt this policy is obvious. There were more than 10,000 petitions pending before the Board when the Revenue Act of 1926 was enacted. Many of the petitioners also had suits, or were contemplating bringing suits, in court. Depriving petitioners of the rights accruing to them under the Revenue Act of 1924 was unwarranted. But there seemed no persuasive reason why they should not also have the newer privileges of the direct review which was accorded by the 1926 Act. Accordingly, Congress provided that a taxpayer having one of these so-called "interim" cases pending before the Board should have an option of obtaining a judicial review under the provisions of the 1924 Act, or under the 1926 Act, as he might choose.

All that section 283(b) states is that the taxpayer with an "interim" case shall not be subject to the prohibition of section 284(d) upon claims or suits for refund. It carefully avoids the grant of an affirmative right. It is negative only. Its legal effect is that the taxpayer in the case now at bar, for example, although he is absolutely bound by the decision of this court in this case, may, if the doctrine of *res judicata* permits, maintain a second suit. This does not mean that the court decision in this case lacks finality. It means only that the taxpayer has *another* cause of action.

The Judgments of the Courts are Enforcible against the Parties.—It is true that the enforcement of the judgments of the courts is dependent upon an executive officer, the Commissioner of Internal Revenue. The duty imposed upon the Commissioner, however, is not discretionary. It is his mandatory duty to enforce the judgment. The absence of process of execution (that is, process of the Board or of the courts) does not militate against the effect of the judgment and mandate of the courts and the decision of the Board pursuant thereto. This Court has repeatedly held that such process is not an indispensable adjunct to an exercise of judicial power. *Fidelity National Bank* v. *Swope* (1927, 274 U. S. 123, 132; *Tutun* v. *United States* (1926), 270 U. S. 568, 576; *La Abra Silver Mining Co.* v. *United States* (1899), 175 U. S. 423, 461.

In its report upon the Revenue Act of 1926, the Committee on Ways and Means stated (H. Rept. No. 1, 69th Cong., p. 20)—

> The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, and the performance of the duty in accordance with law is mandatory.

A similar statement was made in the report of the Committee on Finance upon the Revenue Act of 1926. S. Rept. No. 52, 69th Cong., p. 37.

The case at Bar should be carefully distinguished from the situation presented in *Gordon* v. *United States* (1864), 117 U. S. 697; *United States* v. *Ferreira* (1851), 13 How. 40; and *In re Sanborn* (1893), 148 U. S. 222. In those cases the judgment of the court was subject to revision by an executive officer and the enforcement of the court's judgment was subject to the discretion of the executive officer. In the case now before this Court the Board cannot revise the judgment or mandate of the court or execute it at their pleasure. It is their specific duty to revise their decision in accordance with the judgment and mandate as rendered and issued. Neither can the Commissioner of Internal Revenue revise the final decision of the Board or execute it at his pleasure. It is his specific duty to execute the decision as rendered.

The cases of *Gordon* v. *United States* and *In re Sanborn*, referred to in the preceding paragraph, were ex-

pressly distinguished in the *La Abra Silver Mining Co.* v. *United States* (1899), 175 U. S. 423 case. This case was one in which this Court took jurisdiction under a statute in which its judgment was executed not by court process but solely by mandatory executive action. The case involved the Act of December 28, 1892 (27 Stat. 409), under which the Attorney General was directed to bring suit in the Court of Claims against a mining company to determine whether an award by a United States and Mexican Mixed Commission in respect of a claim by the company against Mexico, was obtained by fraud on the part of the company. If the court determined fraud was present, the President was authorized to return such money to Mexico. If the court determined that fraud was not present, the Secretary of State was directed to distribute the money to the company.

In this *La Abra Silver Mining Company* case it was held that the determination made by the Court of Claims under the above statute was a final and conclusive determination, and not merely ancillary or advisory, that the result of the affirmation by the Supreme Court of the decision of the Court of Claims would be that the mining company was barred from all claims on account of the award of the Commission, and that the result of a reversal of the decision of the Court of Claims by the Supreme Court would be that it then became the absolute duty of the State Department to distribute the money to the company. The case presents a situation in which a judgment was not enforceable by execution of the tribunal rendering the decision and yet the power exercised was

judicial power and the decision could be reviewed by a constitutional court.

The effect of the judgment was merely to give rise to the contingency upon which there came into operation one or the other of two statutory duties imposed upon Government officers, namely, to distribute or not distribute particular funds. For the carrying out of its decision the court was required to rely upon the performance by an executive officer of his statutory duty. This is the same situation as is presented by the dependence of the courts upon the Board of Tax Appeals and the Commissioner of Internal Revenue for the performance of their statutory duty in carrying out the judgment and mandate of the court and decision of the Board, respectively.

It should be apparent from the foregoing that the expressed terms of the statute and the expressed intent of the committees of the Congress, establish the finality (as applicable to a constitutional case or controversy), of the judgment of the Circuit Courts of Appeals in reviewing Board actions.

4. The Matter to be Determined Is Not An Administrative Question.

Keller v. *Potomac Electric Power Co.* (1923), 261 U. S. 428, and *Postum Cereal Co.* v. *California Fig Nut Co.* (1927), 272 U. S. 693, typify cases holding invalid legislation imposing upon constitutional courts the duty of determining administrative questions.

In the former case this Court considered a provision

of the Public Utilities Act of the District of Columbia authorizing the Public Utilities Commission to institute a proceeding in equity in the Supreme Court of the District of Columbia in which the court was required to instruct the commission as to the elements of value to be considered by them in valuations of the properties of public utilities. The court was required to consider the evidence and the full record of the case and substitute its discretion for the legislative discretion of the commission. Furthermore, whenever any valuation or rate based thereon was fixed, further court proceedings *de novo* in character were afforded by the statute in which to set aside the valuation or rate.

In the *Postum Cereal Company* case the statute granted an appeal to the Court of Appeals of the District of Columbia from the decision of the Commissioner of Patents in proceedings for the cancellation of a trade mark registration. This Court held that the review was not of an exercise of judicial power but merely an administrative decision. The court upon appeal was merely instructing the Commissioner of Patents as to the exercise of his administrative function with regard to the cancellation of trade marks. The cancellation of trade marks was an administrative function for the reason that the Commissioner of Patents entered no binding judgment as to the respective rights of the parties to trade mark protection, but on the contrary, the law afforded subsequently a *de novo* court proceeding whereby, irrespective of the decision of the Commissioner of Patents, the

validity of the registration of the trade mark to the Commissioner of Patents could be called into question.

In both the above cases it will be observed that the officer or agency in the Executive branch of the Government was not exercising power judicial in character, but power legislative or administrative in character, and that the decision of the executive officer or agency was not final and did not indisputably and conclusively settle the rights of the parties. On the contrary, in the above cases affirmative provision was made for further judicial adjudication of these rights in proceedings *de novo*. While the questions in the case at bar arise upon a decision by an agency in the Executive branch of the Government, nevertheless that decision is final and does indisputably and conclusively settle the rights of the parties. The decision of the Board reviewed in the case at bar is not legislative, executive, or administrative in character, but judicial in character. The decision declares liabilities as they stand on present or past facts under law supposed already to exist, and are the basis for the enforcement of such liabilities. The decision is, therefore, judicial in its nature. *Prentis* v. *Atlantic Coast Line Co.* (1908), 211 U. S. 210, 226.

All doubt as to the nature of the functions of the Board would seem to be put at rest by this Court in the case of *Blair* v. *Oesterlein Machine Co.* (1927), 275 U. S. 220, in which it was held that the Board is exercising judicial power. In that case this Court in passing on the question whether the Board could review the action of the

Commissioner in special assessment cases said (pp. 226-27):

> But there is no inherent impossibility or, indeed, serious difficulty *in reviewing judicially* any determination authorized by §§327 and 328. The determination is to be made upon prescribed and ascertainable data and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We can not assume that it is to be either arbitrary or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the Board established to review his decisions. *An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character.* Not only is it required by §900(e) to hear and determine appeals taken under §274, which in terms allows an appeal in every case where a deficiency is found by the Commissioner, but it is empowered to administer oaths and to compel the attendance of witnesses and the production of documents and records. It may investigate anew the issues between the government and the taxpayer and upon the determination of the appeal it may affirm, set aside or modify the findings and decision of the Commissioner. (Italics ours.)

Again, on page 227:

> * * * Neither the statute nor the practice of the Department suggests the existence of any governmental policy with respect to the use of

> the returns as evidence in any way inconsistent with the provisions of *the statute authorizing the Board of Tax Appeals to hear appeals and conduct proceedings which are judicial in character.* (Italics ours.)

Furthermore, the appropriate committees of Congress have declared it to be the intention of the legislation to establish a board whose functions were judicial in character. In discussing the procedure for review of the Board's decisions, as first provided by the Revenue Act of 1926, the Committee on Ways and Means stated in its report (H. Rept. 1, 69th Cong., p. 20) that—

> In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, and the

> performance of the duty in accordance with law is mandatory. Such review of a judicial, as distinguished from a legislative or administrative determination, may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The same statement is made in the report of the Senate Committee on Finance, S. Rept. 52, 69th Cong., p. 37.

Again, in the report of the Committee on Ways and Means of the Revenue Act of 1928 (H. Rept. 2, 70th Cong., pp. 30-1) it is stated—

> A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure

> of the board shall, just as the Federal equity rules, have the force and effect of law.

Further, in the report of the Senate Committee on Finance upon the Revenue Act of 1928 (S. Rept. 960, 70th Cong., p. 38) it is stated—

> In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the board, and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer.

Board's Judicial Powers Are Not Drawn from Article III of the Constitution.—While the decisions of the Board of Tax Appeals are judicial in character, the judicial power exercised is, of course, not that drawn from Article III of the Constitution. Territorial courts, District of Columbia courts, and special tribunals created to determine judicial questions arising between the United States as a sovereign government and private individuals, with reference to the exercise of sovereign powers in connection with governmental revenue, grants, debts, mili-

tary forces, duties toward Indian tribes, and the like exercise judicial powers drawn from sources other than Article III of the Constitution. *American Insurance Co.* v. *Canter* (1828), 1 Pet. 511, 546; *United States* v. *Ferreira* (1851), 13 How. 40, 48; *Dynes* v. *Hoover* (1858), 20 How. 65, 79; *Reynolds* v. *United States* (1878), 98 U. S. 145, 154; *City of Panama* (1879), 11 Otto 453, 460; *United States* v. *Winona & St. P. R. R. Co.* (C. C. A. 8th, 1895), 67 Fed. 948, 955; *In re Jessie's Heirs* (1919, D. C. Okla.), 259 Fed. 694, 699; *United States* v. *McDonald* (1920), 265 Fed. 754, 759. Of most persuasive importance in this connection is the opinion in volume 68 of the Congressional Record on page 3181-2.

In the case of the Board of Tax Appeals, its powers are drawn from the authority to create and empower tribunals in connection with the exercise of the sovereign power of laying and collecting taxes, and, if deemed necessary, such additional Congressional authority as is found in the power of Congress under Article I, section 8, paragraph 9, of the Constitution to create tribunals inferior to the Supreme Court, or under Article 1, section 8, paragraph 18, of the Constitution to make all laws necessary and proper to carry into execution the specific powers of Congress.

The territorial courts, District of Columbia courts, and special tribunals, such as those above described, may be vested with nonjudicial powers as well as powers judicial in character. *Gordon* v. *United States* (1864), 117 U. S. 697; *In re Sanborn* (1893), 148 U. S. 222; *Keller* v. *Potomac Electric Co.* (1923), 261 U. S. 428; *Postum*

Cereal Co. v. *California Fig Nut Co.* (1927), 272 U. S. 693; 68th Cong. Rec. 3181-2.

In the case of the Board of Tax Appeals, these powers nonjudicial in character are illustrated by the Board's power to revise the discretion exercised by the Commissioner of Internal Revenue in matters of special assessments. *Blair* v. *Osterlein Machine Co.* (1927), 275 U. S. 220; *Williamsport Wire Rope Co.* v. *United States* (1928), 277 U. S. 551. Even in these matters it may well be that a decision of the Board is reviewable by the courts in order to correct arbitrary action of the Board or errors of law, for example.

Investiture of Board with Powers Judicial in Character is Constitutional.—Any objection raised against the constitutionality of investing the Board with powers judicial in character, would be based upon the theory that the investiture constitutes a violation of the doctrine of separation of powers. It is obvious that Congress is not delegating judicial power to the Board for judicial power (with certain irrelevant exceptions) is not vested in the Congress, as is the legislative power, and, therefore, judicial power can not be delegated by the Congress. The objection grounded upon the doctrine of separation of powers must, if valid at all, be found in the theory that power vested by Article III of the Constitution in the Judicial branch of the Government can not by Act of Congress be transferred to the Executive branch of the Government.

The answer to this objection is clear. The power vested in the Judicial branch of the Government by the Con-

stitution is the judicial power of the United States set forth in Article III of the Constitution. That power, it is true, can not be placed in any tribunal, save one of the constitutional courts, ordained and established by Article III or in pursuance of Act of Congress enacted thereunder. Congress has not attempted, however, to invest the Board of Tax Appeals with judicial power in the sense of Article III of the Constitution.

The judicial power placed in the Board of Tax Appeals finds its source not in Article III but in the power of Congress to collect taxes and to create tribunals in aid thereof. The doctrine of separation of powers is, therefore, not violated by the legislation creating the Board of Tax Appeals, for the judicial power of the United States found in Article III remains unimpaired and vested wholly in the constitutional courts of the United States.

On the other hand, while Congress may not transfer from the Executive branch of the Government any executive power vested in the President by Article II of the Constitution (*Myers* v. *United States* (1926), 272 U. S. 52, 119), or transfer from the Judicial branch any of the judicial power vested in the constitutional courts by Article III of the Constitution, nevertheless the Congress may avail itself of the Executive branch of the Government for the exercise of powers not executive in character. In *Hampton and Co.* v. *United States* (1928), 276 U. S. 394, 406, the Supreme Court has said:

> * * * it is a breach of the National fundamental law if Congress gives up its legislative power and

> transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches *in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch.* In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination. (Italics ours.)

Investiture of the Board of Tax Appeals with judicial power derived from sources other than Article III, is not "an assumption of the constitutional field of action" of the Judicial branch of the Government.

A pertinent example of an agency in the Executive branch of the Government that has been held to be vested with judicial power is the Board of General Appraisers, which was created by the Customs Administrative Act of 1890 (26 Stat. 131, 136, §§12-18). Members of the Board were not appointed for a specific term and were removable by the President for such cause as he deemed sufficient. (*Shurtleff* v. *United States* (1903), 189 U. S. 311, 313.) Members of the Board were to act in divisions at such ports and within such territorial limits as the Secretary of the Treasury might prescribe. All their powers and duties were to be exercised "under

the general direction of the Secretary of the Treasury."

The Board had jurisdiction to examine and decide cases arising as to the dutiable value of merchandise and the decision of the Board in the case was final and conclusive and not subject to review. It was the duty of the collector of customs to ascertain, fix, and liquidate the rate and amount of duties to be paid on the merchandise and the dutiable costs and charges thereon in accordance with the value fixed by the Board. Further, the Board had jurisdiction to examine and decide cases as to the rate and amount of duties chargeable upon imported merchandise and as to the classification of such merchandise. Its decision thereon was final and conclusive except that a review thereof might be had in a Circuit Court of the United States (subsequently in a Circuit Court of Appeals of the United States) upon questions of law and fact. The procedure in such review, prescribed in section 15, is in effect the same as the procedure by which a record and decision of the Board of Tax Appeals goes to the Circuit Court of Appeals for review. Appeal from the Circuit Court decision might be had to the United States Supreme Court. The collector of customs was required to liquidate the entry in accordance with any such final decision.

The Board had authority to administer oaths, to cite persons to appear, and to require the production of papers. Failure to appear or to produce papers in accordance with the Board's citation or requirement constituted an offense subject to a penalty of $100, to be imposed in independent court proceedings.

Subsequently, by the Act of May 27, 1908 (35 Stat. 403, 406), members of the Board of General Appraisers were to hold office during good behavior subject to removal by the President for cause, were invested with the powers of the Circuit Courts of the United States in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt, and by the Tariff Act of 1909 (36 Stat. 11, 99) were given power to establish rules of evidence, practice, and procedure. By the Tariff Act of 1913 (38 Stat. 114, 186) the Board was authorized to exercise "both judicial and inquisitorial functions" in determining dutiable value.

In 1926 Congress changed the name of the Board to "United States Customs Court" although the immunities, tenure of office, powers, duties, rights, and privileges of the members of the Board and jurisdiction, powers, and duties of the Board were to remain the same as under existing law. 44 Stat. 669. Subsequently in the same year, in connection with the Judges Salary Bill (44 Stat. 919, 920), Congress referred to the tribunal as the Board of General Appraisers "which functions as a customs trial court."

Whether the legislation enacted in 1908 and thereafter changed the status of the Board is a disputed point. Cf., 31 Op. Atty. Gen. 577; *United States* v. *Stone & Downer Co.* (1927), 274 U. S. 225, 232; *United States* v. *Schwartz & Co.* (1912), 3 Ct. Cust. App. 24, 32; *United States* v. *Kurtz* (1914), 5 Ct. Cust. App. 144, 146; *Fougera & Co.* v. *United States* (1919), 9 Ct. Cust. App. 284; 27 T. D. 63; 38 T. D. 712; 40 T. D. 404. The determi-

nation of that question, however, is believed to be immaterial to the present argument.

During the period from 1890 to 1908 the status of the Board of General Appraisers was in all essentials similar to that of the Board of Tax Appeals today. In comparing the two agencies we find (1) the members of both appointed by the President for less than life terms and removable by the President in his discretion, (2) the determinations of both subject to appeal to constitutional courts with the exception that determinations of the Board of General Appraisers on dutiable value are not appealable and that determinations of the Board of Tax Appeals are appealable on questions of law only, (3) neither agency specifically given power to punish for contempt but compelled to resort to the courts for the enforcement of its subpoenas, (4) both agencies in the Executive branch of the Government, though the Board of Tax Appeals is independent of the Treasury Department while the Board of General Appraisers was under the general supervision of the Secretary of the Treasury (26 Stat. 131, 136, §12; 21 Op. Atty. Gen. 85), and (5) both tribunals dependent upon the Treasury Department for the execution of their decisions.

The Board of General Appraisers, during the period in question, was considered by the courts as exercising judicial power. *In re Van Blankensteyn* (1892, C. C. A. 2nd), 56 Fed. 474, 477; *Marine* v. *Lyon* (1895, C. C. A. 4th), 65 Fed. 992, 994; *United States* v. *Lies* (1898), 170 U. S. 628, 636. During all that period no objection was raised to the validity of the legislation creating and em-

powering the Board and providing for the review of its decisions, although numerous cases involving decisions of the Board went to the Federal courts and many of them to this Court.

Under the existing law appeals in certain cases may be taken from the Board of General Appraisers (United States Customs Court) to the United States Court of Customs Appeals and from such court to this Court by certificate for review and determination issued upon certiorari or otherwise. Judicial Code, §195; 42 Stat. 858, 970, §515. This procedure by direct appeal from the Board of General Appraisers was undoubtedly familiar to the Committee on Ways and Means and the Committee on Finance, each of which considers both internal revenue and tariff matters.

Other pertinent examples of officers or agencies in the Executive branch of the Government that are vested with authority to make determinations judicial in character subject to direct review by a constitutional court, are the Federal Trade Commission, under section 5 of the Federal Trade Commission Act (38 Stat. 717); the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, under section 11 of the Clayton Act (38 Stat. 730); the Secretary of Agriculture under Title II of the Packers and Stockyards Act of 1921 (42 Stat. 159), and under the Grain Futures Act (42 Stat. 998).

D—THE REVIEW PROCEEDING IS NOT LACKING IN DUE PROCESS.

This Court and the Circuit Courts of Appeals are not to be deprived of jurisdiction on the ground that the statute authorizing the review proceeding is unconstitutional as lacking in due process. It is true that the procedure does not afford the taxpayer any fact-finding by a jury or court; but this is unnecessary in view of the alternative, rather than the substitutional, character of the remedy before the Board. The established suits for refund—against the collector at common law and against the United States by statute—are preserved and remain available to the taxpayer at his option. That these proceedings afford due process has never been questioned. Moreover, in customs revenue matters it has been held within the power of the Congress to deny the taxpayer the right to have a court determination upon such a question of fact as dutiable value. *Passavant* v. *United States* (1893), 148 U. S. 214. Therefore, when the taxpayer voluntarily elects to waive these remedies and go forward under the more convenient procedure before the Board, neither he nor the courts can attack such procedure as a deprivation of due process.

SECOND QUESTION:

DOES THE CIRCUIT COURT OF APPEALS ACT AS A TRIBUNAL OF ORIGINAL JURISDICTION WHEN CONSIDERING APPEALS FROM THE BOARD OF TAX APPEALS? IF SO, MAY IT UNDER TITLE 28, UNITED STATES CODE, SEC. 346, CERTIFY TO THIS COURT QUESTIONS DEEMED NECESSARY FOR THE PROPER DECISION OF A PENDING CAUSE?

IT IS SUBMITTED:

THAT THE CIRCUIT COURTS OF APPEALS MAY CERTIFY TO THIS COURT QUESTIONS DEEMED NECESSARY FOR THE PROPER DECISION OF THE PENDING CAUSE.

In view of the juxtaposition of the two parts of question 2, it is assumed that the question as to whether the Circuit Court of Appeals exercises original jurisdiction or appellate jurisdiction when considering the petitions for review from the Board of Tax Appeals, is deemed necessary of determination in order to determine whether the Circuit Court of Appeals may in any such case certify questions of law to this Court and whether such certification is constitutionally valid.

Title 28, United States Code, section 346, to which the Court refers in its questions, sets forth section 239 of the Judicial Code. Prior to the Act of February 13, 1923 (43 Stat. 938), section 239 read in part as follows—

> In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; * * *

Members of this Court prepared and submitted to the

Congress the bill which ultimately became law as the Act of February 13, 1925. The bill proposed to amend section 239 so as to read in part—

> In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; * * *

This proposed amendment was retained without change in the bill as finally enacted.

In view of the legislative history of the provision it would seem unquestionable that the power of certification by the Circuit Court of Appeals is no longer limited to cases within their appellate jurisdiction as defined in section 128 of the Judicial Code, but now extends to any case, whether original or appellate, so long as it is a constitutional case or controversy.

In an analysis prepared by Members of this Court of the bill above referred to, it is stated in part as follows—

> Section 239: The existing law confines the right of Circuit Courts of Appeals to certify questions to the Supreme Court to cases within their appellate jurisdiction as defined in section 128. *The amendment gives the right in any case in the court.* This effects no material change, however, as the appellate jurisdiction in every case in those courts will be conferred by section 128, as amended by the bill. (Italics ours)—See Hearings before a Subcommittee of the Committee on the Ju-

diciary, United States Senate, 68th Congress, 1st Session, on S. 2060, February 2, 1924, entitled "Procedure in Federal Courts," page 13.

The above statement verifies what section 239 by its very language plainly states, namely, that the right of certification exists in any case before the Circuit Courts of Appeals. There is no limitation dependent upon whether the case is original or appellate.

Of course, as stated in the analysis, the amendment to section 239 made no change in the law in force at the time. Nevertheless the amendment was potentially capable of effecting a change in case any subsequent Act of Congress should confer original jurisdiction upon the Circuit Courts of Appeals. The amendment would cover the present cause even if it were held that the jurisdiction of the Circuit Court of Appeals were original. The policy of certification from a court of original jurisdiction as expressed in section 239, as amended by section 1 of the Judges Act of 1925, conforms to the policy of section 3 of that Act, which newly granted the right of certification of questions of law to this Court from the Court of Claims. That court is one of original jurisdiction and its findings of fact are binding upon this Court in review proceedings.

This Court did not, in its order restoring the present case to its docket for reargument, require that the entire record be brought before it and no attempt has been made to certify the entire case. The Circuit Court of Appeals certified only a question of law for instruction by this Court. The review by the Circuit Court of Ap-

peals and of this Court of decisions of the Board of Tax Appeals is required by the Revenue Act of 1926, section 1003(b), to be confined to questions of law. See page — of this brief. It is respectfully submitted that when the certificate to this Court neither presents the entire record nor certifies for instruction the entire case, but only on the contrary a question of law, and that when the review of this Court is by Act of Congress confined to questions of law, this Court is not exercising original jurisdiction in reviewing the pending cause upon the certificate therein presented. In consequence, section 239 of the Judicial Code, as amended, and section 1003(a) of the Revenue Act of 1926 are not unconstitutional as conferring original jurisdiction upon this Court by authorizing and recognizing the right of certification in this and similar causes.

Counsel are of the opinion that there exists a valid right of certification by the Circuit Court of Appeals to this Court of questions of law in proceedings on petition of review from the Board of Tax Appeals before the Circuit Court of Appeals, and that while such review proceedings are appellate in character, the determination of the character of such proceedings is not necessary in order to reach a conclusion upon the right of certification.

VIII—CONCLUSION

It is respectfully submitted that the procedure prescribed by the Revenue Act of 1926 affording direct and final judicial determination of questions of law with regard to tax liability, vests in the Circuit Courts of Ap-

peals and in this Court jurisdiction upon review which is within the constitutional power of Congress to confer, and that the Circuit Courts of Appeals may validly certify to this Court questions of law necessary to a proper decision in such review proceedings.

The Committee on Federal Taxation of the American Bar Association:

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APPENDIX A — STATUTES INVOLVED

1—STATUTES RELATING TO DEFICIENCY

SEC. 273. [Revenue Act of 1926]. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 274 [Revenue Act of 1926]. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sun-

day as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assumed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency.

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, for the purposes of this subdivision or of subdivision (a)

of this section, or of subdivsion (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

(g) The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

(h) For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005.

* * * *

SEC. 283. [Revenue Act of 1926] (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits, tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purpose of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency

or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

(b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of sub-division (d) of section 284.

* * * *

SEC. 284 [Revenue Act of 1926] * * * (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

2—STATUTES RELATING TO ORGANIZATION AND FUNCTIONS OF BOARD OF TAX APPEALS

TITLE X—BOARD OF TAX APPEALS

SEC. 1000. [Revenue Act of 1926.] Title IX of the Revenue Act of 1924 is amended to read as follows:

"TITLE IX—BOARD OF TAX APPEALS

"MEMBERSHIP OF BOARD

"SEC. 900. The Board of Tax Appeals (hereinafter referred to as the 'Board') is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

"SEC. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

"(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth, four at the end of the tenth, four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years

after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

"SEC. 902. A member of the Board removed from office in accordance with subdivision (a) of section 901 shall not be permitted at any time to practice before the Board.

"ORGANIZATION AND PROCEDURE

"SEC. 903. The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

"SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

"SEC. 905. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division, respectively.

"SEC. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.[1]

"(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case

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[1] Sections 906 and 907 (a) and (b) of the Revenue Act of 1924 were amended as here set out by section 601 of the Revenue Act of 1928.

in which the chairman directs that such report shall be reviewed by the Board.

"(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

"(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

"(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax.[1]

"(f) The findings of the Board made in connection with any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such

Act, continue to be prima facie evidence of the fact therein stated.

"SEC. 907. (a) Notice and opportunity to be heard upon any proceeding instituted before the Board shall be given to the taxpayer and the Commissioner, and a report upon the proceeding and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board. If an opportunity to be heard upon the proceeding is given before a division of the Board, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Board upon review, except upon a specific order of the chairman. Hearings before the Board and its divisions shall be open to the public, and the testimony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has

been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, decision, order, notice, or process.

"(b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.

"(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

"(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the

several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

"(e) The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

"(f) The Secretary of the Treasury shall provide the Board with suitable rooms in courthouses or other buildings when necessary for hearings by the Board, or any division thereof, outside the District of Columbia.

"WITNESSES

"SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of

hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.

"SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

"EXPENDITURES AND PERSONNEL

"SEC. 910. The members of the Board shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be ap-

plicable to the Board of General Appraisers. The employees of the Board shall receive their necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, in an amount not to exceed $5 per day. The Board is authorized in accordance with the civil service laws to appoint, and in accordance with the Classification Act of 1923 to fix the compensation of, such employees, and to make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodical), as may be necessary efficiently to execute the functions vested in the Board. All expenditures of the Board shall be allowed and paid, out of any moneys appropriated for the purposes of the Board, upon presentation of itemized vouchers therefor signed by the chairman. All fees received by the Board shall be covered into the Treasury as miscellaneous receipts. Section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Board when the aggregate amount involved does not exceed the sum of $25.

"FRIVOLOUS APPEALS TO BOARD

"SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon

notice and demand from the collector, and shall be collected as a part of the tax.

"TRANSFEREE PROCEEDINGS

"SEC. 912. In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.[a]

"SEC. 913. Upon application to the Board, a transferee of property of a taxpayer shall be entitled, under rules prescribed by the Board, to a preliminary examination of books, papers, documents, correspondence, and other evidence of the taxpayer or a preceding transferee of the taxpayer's property, if the transferee making the application is a petitioner before the Board for the redetermination of his liability in respect of the tax (including interest, penalties, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer. Upon such application the Board may require by subpœna, ordered by the Board or any division thereof and signed by a member, the production of all such books, papers, documents, correspondence, and other evidence within the United States the production of which, in the opinion of the Board or division thereof, is necessary to enable the transferee to ascertain the liability of the taxpayer or preceding transferee and will not result in undue hardship to the taxpayer or preceding trans-

[a] Sections 912 and 913 were added to Title IX of the Revenue Act of 1924, as amended, by section 602 of the Revenue Act of 1928.

feree. Such examination shall be had at such time and place as may be designated in the subpœna."'

COURT REVIEW OF BOARD'S DECISION

SEC. 1001. [Revenue Act of 1926.] (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with

surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.*

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated.

(e) Nothing in subdivision (c) shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

VENUE

SEC. 1002. [Revenue Act of 1926.] Such decisions may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

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*Paragraphs (c) and (d) of this section were amended as here set out by section 603 of the Revenue Act of 1928.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

JURISDICTION

SEC. 1003. [Revenue Act of 1926.] (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

SEC. 1004. (a) The Circuit Courts of Appeals, the Court of Appeals of the District of Columbia, and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay.

(b) The Board is authorized to fix a fee, not in excess of the fee fixed by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record.

DATE ON WHICH BOARD'S DECISION BECOMES FINAL

SEC. 1005. [Revenue Act of 1926.] (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the

Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall be-

come final in the same manner as though no prior decision of the Board had been rendered.

(e) As used in this section—

(1) The term "Circuit Court of Appeals" includes the Court of Appeals of the District of Columbia;

(2) The term "mandate," in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

APPENDIX B—STATEMENT BY THE CHAIRMAN OF THE BOARD OF TAX APPEALS

AMERICAN BAR ASSOCIATION

Organized 1878

COMMITTEE ON FEDERAL TAXATION

1928-1929

HUGH SATTERLEE, *Chairman*
52 William Street
New York, N. Y.
GEORGE M. MORRIS, *Secretary*
815 Fifteenth Street N. W.
Washington, D. C.
ALBERT L. HOPKINS
110 S. Dearborn Street
Chicago, Illinois
LOUIS A. LECHER
Trust Company Building
Milwaukee, Wisconsin
ROBERT N. MILLER
922 Southern Building
Washington, D. C.
MURRAY M. SHOEMAKER
First National Bank Building
Cincinnati, Ohio
HARRY C. WEEKS
Staley Building
Wichita Falls, Texas

March 30, 1929.

Hon. Benjamin H. Littleton, Chairman,
U. S. Board of Tax Appeals,
Washington, D. C.

Dear Sir:

In connection with a brief which this Committee as *amici curiae* is preparing for presentation to the Supreme Court in Old Colony Trust Company v. Commissioner, No. 130, it seems pertinent to the issue to afford that court some description of the actual procedural functioning of your Board.

We would greatly appreciate a brief authoritative description of the practice and procedure before the United

States Board of Tax Appeals and the results of its operation from its inception to the present time.

Very truly yours,
Committee on Federal Taxation
of the
American Bar Association
By GEORGE M. MORRIS,
Secretary.

GMM:hw

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

(SEAL)
BENJAMIN H. LITTLETON
Chairman

April 8, 1929.

Committee on Federal Taxation,
American Bar Association,
George M. Morris, Esq., Secretary.

Sirs:

In compliance with your request of March 30, 1929, I submit the following statement concerning the operations of the United States Board of Tax Appeals:

Since the organization of the Board on July 16, 1924, in order to make a record upon which the issues involved might be presented in an orderly manner and properly determined, the practice and procedure adopted and followed in the hearing of proceedings instituted have been, as far as practicable, in conformity with the practice and procedure obtaining in the United States District Courts in cases heard without the intervention of a jury. Upon

organization the Board published its rules of practice and procedure, which, with slight amendments, are still in force. These Rules are printed in Volume 7 B. T. A. 1357, and for convenience copies are attached hereto.

The petitioner, who is always the taxpayer, institutes his proceeding before the Board by the filing of a petition in which he sets forth the errors claimed to have been made by the Commissioner and a detailed statement of the facts upon which the petitioner relies as a basis of his claim that the deficiency, as determined by the Commissioner, is erroneous in whole or in part, and in addition (if he so claims), that he has overpaid his tax. A copy of this petition is served by the Board upon the Commissioner and within the time fixed by the rules of the Board the Commissioner moves in respect of the petition or within sixty days files an answer specifically admitting or denying the allegations of the petition. The Commissioner is, and was under the 1924 Revenue Act, required affirmatively to allege and prove any new matter. Under the Revenue Act of 1926 the Commissioner has the burden of proof in fraud and transferee cases. The proceeding thereupon becomes at issue and after being placed upon the calendar for hearing, and the parties and their counsel have been notified, the proceeding is called for hearing.

Prior to the hearing the record before the Board consists only of the petition and the answer. Either party may take testimony by deposition and each party is given an opportunity at the hearing to present the oral testimony of witnesses by direct and cross-examination and

such documentary evidence as may be pertinent to the issue involved and competent under the rules of evidence. All testimony is stenographically reported. A docket similar in form and content to the docket of the clerks of the United States District Courts is maintained in which the customary docket entries are made in every proceeding. Since the beginning of the Board's operations it has enforced the rules of evidence in the hearing of all cases. The Revenue Act of 1926 requires that these rules be those applicable in courts of equity of the District of Columbia.

Upon the filing of a petition for review the Board prepares and settles the record in accordance with the rules of the Appellate Courts, and transmits the record to the Clerk of the Court in which review is sought.

The records of the Board show the following with reference to proceedings instituted before it for the period July 16, 1924, to March 31, 1929:

	Total	*Total of deficiencies determined and claimed by the Commissioner*	*Net amount determined by the Board*
Proceedings instituted	43,413	$965,587,760.84	
Total heard and decision entered	24,493	493,870,435.14	$193,056,242.86
Proceedings heard and decided and awaiting entry of decision upon recomputation under Rule 50	340		
Heard and submitted for preparation of opinion	882		
Proceedings pending for hearing on March 31, 1929	17,698		

The Board's records further show the following relative to proceedings instituted prior to February 26, 1926 (the date of approval of the Revenue Act of 1926), and heard and decided between February 26, 1926, and February 28, 1929:

	Total	*Total of deficiencies determined and claimed by the Commissioner*	*Net amount determined by the Board*
Proceedings instituted	12,341		
Heard and decided by formal findings of fact and opinion or by memorandum, or dismissed by order other than by consent or agreement of the parties	5,039	$103,951,480.51	$50,356,225.77
Taken to U. S. Circuit Courts of Appeals by petition for review	370		
Taken to Court of Appeals of District of Columbia	48		
Total appeals decided by Courts	142		
Proceedings as to which the six-months period for filing petition for review had not expired on February 28, 1929	358		
Proceedings heard and decided by Board on the merits by opinion or order as to which the time for filing petition for review had expired	4,263		
Proceedings awaiting hearing by Board	313		
Heard, awaiting opinion	89		
Heard and determined, and awaiting recomputation under Rule 50 for entry of decision	99		

Proceedings decided upon stipulation of the taxpayer and the Commissioner of Internal Revenue as to the deficiency or overpayment, or dismissed upon motion by consent of the parties have been eliminated in arriving at the figure of 5,039 shown above as proceedings heard and decided on the merits.

The following tabulation shows the result of operations as to proceedings instituted and heard and decided between February 26, 1926, and March 31, 1929:

	Total	*Total of deficiencies determined and claimed by the Commissioner*	*Net amount determined by the Board*
Proceedings instituted	31,072		
Proceedings heard and decided by formal findings of fact and opinion or memorandum, or heard and dismissed by order other than by stipulation or agreement of the parties	4,586	$38,296,608.13	$25,563,841.48
Taken to U. S. Circuit Courts of Appeals by petition for review	181		
Taken to Court of Appeals of District of Columbia	11		
Appeals decided by Appellate Courts	31		
Proceedings as to which the six-months period for filing petition for review had not expired	1,101		
Proceedings heard and decided by Board on merits by opinion or order, as to which the period for filing petition for review had expired on March 31, 1929	3,293		

Proceedings decided upon stipulation of the taxpayer and the Commissioner of Internal Revenue as to the deficiency or overpayment, or dismissed upon motion by consent of the parties have been eliminated in arriving at the figure of 4,586 shown above as proceedings heard and decided on the merits.

The term "Net Amount determined by the Board" in the above tabulations means the total of the deficiencies determined by the Board less overpayments found to have been made by the taxpayer.

The following tabulation shows the rate at which proceedings are being instituted and decided by the Board, such tabulation including the period from June, 1928, to and including March, 1929:

Year and Month	*Docketed*	*Cases Decided*			
		By Opinion on the Merits	*Upon stipulation or agreement of deficiency*	*By memorandum or order of dismissal*	*Total decided*
1928					
June	540	259	533	173	965
July	444	120	410	86	616
August	478	76	444	71	591
September	333	134	407	87	628
October	430	169	619	160	948
November	425	153	477	133	763
December	465	97	457	94	648
1929					
January	350	126	460	104	690
February	500	141	557	99	797
March	398	135	650	164	949

Respectfully,

BENJAMIN H. LITTLETON, *Chairman*,
United States Board of Tax Appeals.

RULES OF PRACTICE

BEFORE THE

UNITED STATES BOARD OF TAX APPEALS

Revised to May 1, 1928

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON
1928

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RULES OF PRACTICE BEFORE THE UNITED STATES BOARD OF TAX APPEALS

(These rules are promulgated pursuant to authority of section 907 (a) of the Revenue Act of 1924, as amended by sec. 1000 of the Revenue Act of 1926, which provides in part that "The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.")

RULE 1.—BUSINESS HOURS

The office of the Board at Washington, D. C., will be open each business day from 9 o'clock a. m. to 4.30 o'clock p. m.

RULE 2.—ADMISSION TO PRACTICE

A register will be maintained by the Board in which will be entered the names of all persons entitled to practice before the Board. Corporations and firms will not be admitted or recognized.

The following classes of persons whom the Board finds, upon consideration of their applications, to be of good moral character and to possess the requisite qualifications to represent others may be admitted to practice before the Board:

(a) Attorneys at law who are admitted to practice before the Supreme Court of the United States or the highest court of any State or Territory or the District of Columbia.

(b) Certified public accountants duly qualified under the law of any State or Territory or the District of Columbia.

An application under oath for admission to practice shall be addressed to the United States Board of Tax Appeals, Washington, D. C., and must state the name, residence address, and business address of the applicant, and the time and place of his admission to the bar, or qualification as a certified public accountant. Such application shall also state whether the applicant has ever been suspended or disbarred as an attorney in any court, or his right to practice as a certified public accountant suspended or revoked in any jurisdiction. Such application shall be accompanied by a certificate of the clerk of the court in which the applicant is admitted to practice to the effect that he has been so admitted and is in good standing; or a certificate by the proper State, Territorial, or District

authority to the effect that the applicant is a certified public accountant in good standing, duly qualified and entitled to practice in such State or Territory or the District of Columbia.

(See Form No. 1.)

The Board may, in its discretion, deny admission, suspend, or disbar any person who, it finds, does not possess the requisite qualifications to represent others, or is lacking in character, integrity, or proper professional conduct. An attorney or certified public accountant who has been admitted to practice may be disbarred only after he is afforded an opportunity to be heard.

The Board shall have the right at any time to require a statement, under oath, of the terms and circumstances of any contract of employment of an attorney or certified public accountant with the taxpayer he represents.

Any individual taxpayer or member of a taxpayer partnership may appear for himself or such partnership upon adequate identification to the Board. A taxpayer corporation may be represented by a bona fide officer of the corporation upon permission granted, in its discretion, by the Board or the Division sitting.

RULE 4.—FORM AND STYLE OF PAPERS

All papers filed with the Board shall be either printed or typewritten, and if typewritten shall be on one side of plain white paper only, which shall be not more than 8½ inches wide and 11 inches long, weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, and fastened on the left side. Copies shall be legible, but may be on any weight paper. If printed, they shall be in 10 or 12 point type, on good unglazed paper, 5⅞ inches wide by 9 inches long, with inside margin not less than 1 inch wide, and with double-leaded text and single-leaded quotations. Citations shall be in italics.

RULE 5.—INITIATION OF A PROCEEDING—PETITION

A proceeding shall be initiated by filing with the Board a petition, as provided in Rules 6, 7, and 8. It shall contain:

(*a*) A caption in the following form:

UNITED STATES BOARD OF TAX APPEALS

Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No.....

(*b*) Proper allegations showing jurisdiction in the Board.

(*c*) A statement of the amount of the deficiency, the nature of the ax, the year for which asserted, and the amount thereof (as nearly s may be determined) in controversy.

(*d*) Clear and concise assignments of error alleged to have been ommitted by the Commissioner. Such assignments of error shall e numbered.

(*e*) A clear and concise statement of the facts upon which the etitioner relies as sustaining the assignments of error.

(*f*) A prayer, setting forth relief sought by the petitioner.

(*g*) A verification by the petitioner.

(*h*) A copy of the notice of deficiency shall be appended to the etition.

The petition shall be complete in itself so as fully to inform the Board of the issues to be presented. The petition shall be signed y the petitioner or his counsel and shall be verified by the petiioner. The signature of counsel shall be in individual and not n firm name. The name and mailing address of the petitioner r of counsel shall be typed or printed immediately following the ignature.

The signature of counsel and the verification of the petitioner to he petition shall be considered the certificate of each that there s good ground for the petition, that the proceeding has not been nstituted merely for delay and is not frivolous.

(See Form No. 2.)

RULE 6.—DESIGNATION OF PARTIES

The proceeding shall be brought in the name of the party in nterest. If an individual, the full given name and surname shall e set forth in the caption. If a married woman, her given name hall be used. If a fiduciary, both the names of the fiduciary and f the estate, trust, or other person for whom he acts shall be used. n the event of a variance between the name set forth in the defiiency notice and the correct name, as used in the caption of the etition, a statement of the reasons for such variance shall be set orth in the petition.

The original caption shall be placed on all papers filed.

RULE 7.—FILING OF PETITION

An original and four clear copies of the petition, either printed or ypewritten as provided in Rule 4, shall be filed with the Board at Washington, D. C. The copies of the petition shall be conformed o the original by the petitioner.

Failure to file a sufficient number of copies, as provided in this rule, or to conform to the requirements of Rule 5, shall be ground for dismissal of the proceeding.

RULE 8.—FEE FOR FILING PETITION

A fee of $10 is hereby imposed for the filing, after the enactment of the Revenue Act of 1926, of any petition. No such petition may be filed until such fee is paid to the Board, nor will the filing of any petition be antedated to a time prior to the payment of such fee.

RULE 11.—DOCKET

Upon receipt of the petition, accompanied by the filing fee provided by Rule 8, the proceeding will be docketed and assigned a number and the parties notified thereof. This number shall be placed by the parties on all papers filed thereafter in the proceeding.

RULE 12.—SERVICE ON THE COMMISSIONER

Upon filing of a petition and the copies, as prescribed in Rule 7, the Board will serve a copy upon the Commissioner.

The Commissioner shall not be required to answer any petition unless and until he has been served with a copy thereof as herein provided.

Service of copy of petition on the Commissioner, or a person designated by him, shall suffice in lieu of process.

RULE 14.—ANSWER [1]

After service upon him of a copy of the petition, the Commissioner shall have 60 days within which to file an answer or 45 days within which to move in respect of the petition. The answer shall be so drawn as fully and completely to advise the petitioner and the Board of the nature of the defense. It shall contain a specific admission or denial of each material allegation of fact contained in the petition and shall set forth any new matters upon which the Commissioner relies for defense or affirmative relief. Each paragraph contained in the answer shall be numbered to correspond with the paragraphs of the petition. An original and four copies of the answer shall be filed, of which the original shall be signed by the Commissioner or his counsel and the copies conformed by him.

RULE 15.—SERVICE OF ANSWER

Upon the filing of the answer the Board will serve one copy thereof on the petitioner or his counsel by registered mail.

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[1] Amended May. 1, 1928.

RULE 16.—SERVICE ON COUNSEL

Service of any pleading, order, or notice upon the counsel of record shall be deemed service thereof upon the party.

RULE 17.—JOINDER OF ISSUE

A proceeding shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the petitioner.

RULE 18.—AMENDED AND SUPPLEMENTAL PLEADINGS

The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed, a petition may be amended only by consent of the Commissioner or on leave of the Board.

Upon motion made, the Board may, in its discretion, at any time before the conclusion of the hearing, permit a party to a proceeding to amend the pleadings to conform to the proofs.

RULE 19.—FURTHER AND BETTER STATEMENT IN PLEADING MAY BE REQUIRED

A further and better statement of the nature of the claim or defense, or of any matter stated in any pleading, may be ordered in any proceeding.

RULE 20.—EXTENSIONS OF TIME

Continuances, extensions of time (except for the filing of the petition), and adjournments may be ordered by the Board on its own motion or may be granted by it in its discretion on motion of either party filed in writing and showing good and sufficient cause therefor.

RULE 24.—CALENDARS

(*a*) *General calendar.*—All proceedings will as of course be placed upon the general calendar in the order in which they are at issue.

(*b*) *Circuit calendar.*—A proceeding may, in the discretion of the Board and upon timely motion, be placed upon the circuit calendar for hearing outside Washington.

(*c*) *Day calendar.*—The clerk will, from time to time as directed by the Chairman, prepare a day calendar of the proceedings to be heard in Washington and elsewhere, and cases will be placed thereon as nearly as may be in the order in which they are at issue.

(*d*) *Reserve calendar.*—The hearing of a proceeding may be placed on the reserve calendar for good cause shown, as, for example, to await the decision of the Supreme Court in a case pending.

RULE 25.—NOTICE OF HEARING

When a proceeding has been placed upon the day calendar the clerk will, not less than 15 days in advance, notify the parties of the place where and the date when it will be called upon the day calendar.

RULE 26.—HEARING FEES

A hearing fee of $10 is hereby imposed on every proceeding pending before the Board at the time of the enactment of the Revenue Act of 1926, which has not been heard on the merits before such enactment. Such fee shall be paid on demand and before the hearing of any such proceeding. Failure to pay such fee shall be sufficient ground for the dismissal of the proceeding.

RULE 27.—CALL OF CALENDAR AND ASSIGNMENT FOR HEARING

A calendar of proceedings to be heard at Washington will be called at 9.30 a. m., and elsewhere at 10 a. m., on the date set, and the proceedings which are ready to be heard will be assigned for hearing in due course.

RULE 29.—SUBMISSION WITHOUT PERSONAL APPEARANCE

A proceeding in which issue has been joined, in which no issue of fact is raised, or in which evidence of contested facts has been submitted other than by oral hearing before the Board, or one in which there is a contested motion not predicated on an issue of fact, and both parties are not present in person or by counsel at the time of hearing, will be regarded as submitted on the part of the absent party or parties. Briefs may be filed in lieu of personal appearance, but the Board may, in its discretion, require appearance for argument.

Where there is a joinder of issue on questions of fact, the provisions of this rule relative to submission without argument shall not relieve the party upon whom rests the burden of proof from adducing at the hearing proper evidence in support of the issues. Statements in the petition, *ex parte* affidavits, and briefs do not constitute evidence. Failure to adduce evidence in support of facts alleged in the petition and denied by the Commissioner in his answer will be ground for dismissal.

RULE 30.—BURDEN OF PROOF

The burden of proof shall be upon the petitioner, except that in respect of any new matter of fact pleaded in his answer, it shall be upon the respondent.

RULE 31.—DISMISSAL

A proceeding may be dismissed for cause upon motion of either party or by the Board upon its own motion.

RULE 32.—MOTIONS

Motions must be timely and, except during trial, must be in writing, and an original and four copies filed. One copy will be served upon the adverse party. Motions will be acted upon as justice may require and may, in the discretion of the Board, be placed upon the day calendar in Washington for argument, and in that event both parties will be notified thereof not less than 15 days before the date so set.

The filing of a motion shall not constitute cause for postponement of a hearing from the date set.

RULE 35.—BRIEFS

Briefs may be filed within the time fixed by the Division before which the hearing is had. If the briefs are typewritten, an original and 4 copies shall be filed; if printed, 20 copies.

Briefs shall contain, in the order here stated:

(*a*) A statement of the nature of the tax and how the proceeding comes before the Board.

(*b*) A concise statement of the facts, which should contain references to the pages of the transcript or to the exhibits relied upon in support thereof.

(*c*) A concise statement of the points upon which the petitioner relies.

(*d*) The argument.

Every brief of more than 20 pages shall contain on its front flyleaves a table of contents with page references, supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

RULE 36.—SUBSTITUTION OR WITHDRAWAL OF COUNSEL—NOTICE OF APPEARANCE

Counsel of record shall promptly notify the Board of his withdrawal as counsel for the petitioner in any proceeding pending. Where the petition is not subscribed by counsel, or counsel has withdrawn, counsel subsequently appearing for the petitioner shall immediately file a notice of appearance, which shall include a statement of the mailing address of such counsel.

RULE 37.—SUBSTITUTION OF PARTIES

In the event of the death of a petitioner or for other cause, the Board may order the substitution of the proper parties. In event of mistake in the name of title of a proper party the Board may order substitution of the proper name or title in any proceeding before the Board.

RULE 38.—STIPULATIONS

The parties may, by stipulation in writing filed with the Board or presented at the hearing, agree upon any facts involved in the proceeding.

RULE 39.—EVIDENCE

The rules of evidence applicable in courts of equity of the District of Columbia shall govern the admission or exclusion of evidence before the Board or any of its Divisions.

RULE 40.—TRANSCRIPTS OF PROCEEDINGS

Hearings before the Board or its Divisions shall be stenographically reported and a transcript thereof shall be made if, in the opinion of the Board or of the Division holding the hearing, a permanent record of the hearing is deemed necessary. Transcripts shall be supplied to the parties and to the public by the official reporter at such rates as may be fixed by contract between the Board and the reporter.

RULE 43.—DOCUMENTARY EVIDENCE

(*a*) When books, records, papers, or documents have been received in evidence, a copy thereof or of so much thereof as may be material or relevant may, in the discretion of the Division holding the hearing, be substituted therefor.

(*b*) After the decision of the Board in any proceeding has become final the Board may, upon motion of either party, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any Division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

RULE 44.—SUBPŒNAS[1]

(*a*) *How issued.*—No subpœna will be issued at the instance of either party except upon written application timely made.

(*b*) *Application for.*—The application shall state the name and address of each witness required, the time and place at which and the person before whom he is to appear, and whether he may designate someone to appear in his place.

(See Form No. 3.)

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[1] Amended Dec. 27, 1927.

(c) *For production of documents.*—If evidence other than oral testimony is required, such as documents or written data, the application shall set forth the specific matter to be produced and sufficient facts to indicate that such matter is reasonably necessary to establish the cause of action or defense of the applicant.

(d) *Service and proof.*—The Board will not serve subpœnas, but will leave service to be procured by the party making the application. Service may be made by any citizen of the United States over the age of 21 years and competent to be a witness, and not a party to or in any way interested in the proceeding. Proof of service may be made by affidavit.

(See Form No. 4.)

RULE 45.—DEPOSITIONS

Depositions may be taken in accordance with the following rules:

(a) *Application to take.*—When either party proposes to take a deposition, a verified application, with two conformed copies, shall be filed with the Board setting forth the following:

(1) The name and post-office address of the witness whose deposition is proposed to be taken.

(2) The subject matter or matters concerning which the witness is to testify, together with a statement of the reasons why it is desired to take the depositions and why the witness should not be required to appear personally and testify at the hearing.

(3) The time and place of taking the deposition and the name, post-office address, and official designation of an individual competent to administer oaths under the Revenue Act of 1926 before whom it is proposed that the deposition shall be taken.

(See Form No. 5.)

(b) *Order for.*—Upon receipt of such application, the Board will serve a copy thereof on the opposite party, allow a reasonable time for objection thereto and will, in its discretion make an order, copy of which will be mailed or delivered to the parties or their counsel, wherein the Board will name the witness whose deposition is to be taken and specify the time when, the place where, and the officer before whom the witness is to testify, but such time and place and the officer before whom the deposition is to be taken, so specified in the Board's order, may or may not be the same as those named in the application to the Board.

(See Form No. 6.)

(c) *By stipulation.*—At any time after issue is joined the parties or their counsel may, by stipulation duly signed and filed, take depositions. In such cases the stipulation shall state the name and address of each witness, the time when, and the place where such

deposition will be taken, and the name, address, and official title of the officer before whom it is proposed to take the deposition. In such cases no order to take such deposition will be issued, but such deposition shall be taken and returned by the officer in accordance with the rules of the Board.

(*d*) *Manner of taking.*—Each question propounded to the witness must be recorded and his answers must be taken down in his own words.

Objections to questions or answers shall be explicitly but briefly and concisely stated, but no comment, explanation, or argument of any kind shall be recorded; neither shall there be recorded any comment, explanation, or argument by examining counsel. Any matter reported in violation of this rule may be sufficient cause for the suppression of the deposition.

(*e*) *Witnesses not named in notice.*—If both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witness produced under the notice, be entitled to produce and examine other witnesses; but in such case one day's notice must be given to the adverse party or his attorney there present, unless such notice is waived.

RULE 46.—GENERAL PROVISIONS AS TO DEPOSITIONS

(*a*) *Other witnesses to be excluded.*—At the request of either party a person whom either expects or intends to call as witness in the same case or in any kindred case shall be excluded from the room where the testimony of a witness is being taken. If such person remains in the room or within hearing of the examination after such request has been made, he shall not thereafter be admitted to testify in the case or any kindred case except by the consent of the party who requested his exclusion.

(*b*) *Of the oath.*—Witnesses must be sworn or affirmed before any questions are put to them.

(*c*) *Depositions to be signed.*—The testimony of the witness when transcribed shall be read over to or by him and be signed by him.

(*d*) *What return must show.*—In his return the officer must show that the witness was properly sworn or affirmed and that the questions and answers were taken down in his presence.

(See Form No. 6.)

(*e*) *Sheets to be attached.*—The officer must so fasten the sheets of the deposition that they can not be tampered with. He must spare no pains to return to the Board the exact evidence he has taken. All exhibits must be carefully marked so as to be capable of identification and when practicable must be attached to the deposition.

(*f*) *Caption.*—The officer must state in the caption of the deposition the cause in which it was taken, the place and date of taking, the

name of the witness, the party by whom called, and the names of parties and counsel present, and the body of the deposition must also show by whom the witness was examined and cross-examined.

(*g*) *Qualification of officer.*—In no case shall a deposition be taken before any person who has any office connection or business employment with the taxpayer or his attorney except by consent of parties and when no other officer is available, and in his certificate to such deposition such officer shall so certify.

(*h*)[1] *Return of.*—The officer must inclose the original depositions and exhibits, together with two copies of the depositions, in a sealed packet, with postage or charges prepaid, and direct and mail or express the same to the United States Board of Tax Appeals, Washington, D. C. In each case the original of the depositions must be directed and mailed or expressed to the Board. The officer may, upon written request, deliver a copy of the depositions to either or to both of the parties, or to their representatives, in lieu of sending such copies to the Board as above provided. If one or both of the required copies are delivered by the officer taking the depositions, he shall attach to his return the written request of the party or parties, or of their counsel to whom such copy or copies were delivered, and shall state in his certificate of return the fact of delivery by him of such copy or copies. If copies of the depositions are delivered by the officer taking the same, no service of copies of such depositions upon the party or his counsel of record will be made by the Board.

(*i*) *Limitation on time for application to take.*—Applications to take depositions must be filed at least 30 days prior to the date set for the hearing of the proceeding, and such depositions must be completed and filed with the Board at least 10 days prior to the hearing: *Provided*, Such applications will not be regarded as sufficient ground for the granting of a continuance from the date or place of the hearing theretofore set, unless the proceeding shall have been at issue less than 60 days and the motion for continuance shall have been filed not less than 20 days prior to said date of hearing: *Provided further*, That under special circumstances, and for good cause shown, the Board may otherwise order.

RULE 47.—DEPOSITIONS ON WRITTEN INTERROGATORIES

Depositions may be taken in the discretion of the Board on written interrogatories in substantially the same manner as provided in Rules 45 and 46 for depositions on oral examinations. The interrogatories must be filed with the applications in triplicate and a copy thereof will be served upon, or mailed to, the opposite party by the Board. Within 10 days after such notice such opposite party

[1] Amended Aug. 1, 1927.

may file with the Board his objections, if any, to such interrogatories, together with any cross-interrogatories he desires to propose. If he file cross-interrogatories, they shall be filed with the Board in triplicate and one copy thereof will be forwarded to the opposite party, or his counsel, who shall within 10 days thereafter file his objections, if any, to such cross-interrogatories. No objections to the interrogatories or cross-interrogatories will be considered at the hearing unless taken before the order for the taking of the deposition issues.

When a deposition is taken upon written interrogatories and cross-interrogatories neither the counsel for the taxpayer nor for the Commissioner, nor any person other than the witness, a stenographic reporter and the officer taking the deposition shall be present at the examination of the witness, which fact shall be certified by the officer taking the deposition who shall in such case propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness's own words.

Depositions obtained in foreign countries must be taken on written interrogatories.

RULE 59.—SETTLEMENT OF FINAL DETERMINATION [1]

When the Board determines the issues in any proceeding and withholds final decision of the deficiency or overpayment for later computation, the parties shall, if they are in agreement as to the amount of the deficiency or overpayment, in accordance with the determination of the Board, file with the Board an original and four copies of a computation showing the amount for entry of final decision forthwith. If the parties are not in agreement as to the amount to be entered in the final decision, either of them may file with the Board a computation of the deficiency or overpayment believed by him to be in accordance with the determination of the Board. The clerk will serve a copy thereof upon the opposite party and will thereupon place the matter upon the day calendar for hearing in due course and give the usual notice. If the opposite party fails to file objection, accompanied by an alternative computation, within 5 days prior to the date of such hearing, or any continuance thereof, the deficiency or overpayment shown in the computation already submitted shall be taken to be correct and decision thereon will be entered. If the parties submit different computations and amounts, they will be afforded an opportunity to be heard thereon on the date fixed, and the Board will determine the correct deficiency or overpayment and enter final decision.

Any hearing under this rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no

[1] Amended Apr. 28, 1928.

argument will be heard upon or consideration given to the issues or matters already disposed of by such determination or of any new issues. This rule is not to be regarded as affording an opportunity for rehearing or reconsideration.

RULE 51.—COSTS—PREPARATION OF RECORD ON REVIEW[1]

It shall be the duty of the clerk, immediately after the contents of a record on review have been settled or agreed to, to notify the petitioner of the costs and charges for the preparation, comparison and certification of said record; such charges to be determined in accordance with the provisions of an Act of Congress entitled "An Act to provide fees to be charged by clerks of the district courts of the United States," approved February 11, 1925, 43 Stat. 857–8.

No transcript will be certified and transmitted to the appellate court until the costs and charges therefor have been paid to the Board.

RULE 52.—COSTS—PRINTING OF RECORD ON REVIEW[2]

In each proceeding for review of a decision of the Board by the United States Circuit Court of Appeals for the Second Circuit when review is sought by the Commissioner of Internal Revenue, the clerk of the Board shall, immediately after the contents of the record on review, as required by Rule 35 of the Court, have been settled or agreed upon, make available to the Commissioner, or his counsel, the record of the Board in the proceeding. The Commissioner shall cause the record to be printed. Sixteen copies of the printed record shall be delivered to the clerk of this Board for certification and filing with the clerk of the Circuit Court of Appeals. The clerk of the Board shall serve five copies of the printed record upon counsel for the taxpayer by registered mail.

RULE 60.—FEES AND MILEAGE

The following is from the Revenue Act of 1926:

"SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

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[1] Adopted July 2, 1927.

[2] Adopted Dec. 6, 1927.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926."

No witness, other than one for the Commissioner, shall be required to testify in any proceeding before this Board until he shall have been tendered the fees and mileage to which he is entitled in accordance with the above provision of law.

RULE 61.—COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS

When the time prescribed by these rules for doing any act expires on a Sunday or a legal holiday in the District of Columbia, such time shall extend to and include the next succeeding day that is not a Sunday or such a legal holiday: *Provided*, That when the time for performing any act is prescribed by statute nothing in these rules shall be deemed to be a limitation or extension of the statutory time fixed.

The following-named days are legal holidays within the District of Columbia:

New Year's Day, January 1 (Sec. 993, Revised Stat. relating to D. C.).

Washington's Birthday, February 22 (Act of January 31, 1879).

Inauguration Day, every fourth year (Act of June 18, 1888).

Decoration Day, May 30 (Act of August 1, 1888).

Fourth of July (Sec. 993, Revised Stat. relating to D. C.).

Labor Day, first Monday in September (Act of June 28, 1894).

Thanksgiving Day, day proclaimed by President (Sec. 993, Revised Stat. relating to D. C.).

Christmas Day, December 25 (Sec. 993, Revised Stat. relating to D. C.).

When legal holidays fall on Sunday the next day shall be a holiday (Act of December 20, 1881).

RULE 62.—SPECIAL ASSESSMENT[1]

(*a*) If some of the issues raised by the petition involve section 327 or section 328 of the Revenue Act of 1918 or of 1921 (or section 210 of the Revenue Act of 1917, as the case may be), and some do not involve such sections, the hearing may, in the discretion of the Board, on motion, be limited in the first instance to trial of the issues which do not involve such sections.

[1] Adopted Dec. 28, 1927.

(*b*) After decision on such other issues, or if no such other issues are raised by the pleadings, a hearing may, in the discretion of the Board, on motion, be had, limited to the trial of the issue whether the petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be).

(*c*) If the Board decides that the petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), the respondent shall within 60 days after such decision file with the Board an original and four copies of a proposed redetermination showing the basis and method of the computation. If, within 20 days after service by the Board upon the petitioner of a copy of such proposed redetermination, the parties are unable to agree upon the amount of tax, either party may move, or the Board may upon its own motion order, that the case be placed upon the day calender for further hearing, at which either party may submit proof of the correct amount of tax and deficiency or overpayment.

(*d*) If from the pleadings or otherwise it appears of record before the Board that the parties agree that petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), and the only issue is as to the correct amount of the tax so determined, the case will be placed upon the day calender in due course for hearing, at which either party may submit proof of the correct amount of the tax and deficiency or overpayment.

APPENDIX

FORMS

These forms are subject to amendment as circumstances may render necessary.

No. 1. Application for admission to practice.
No. 2. Petition.
No. 3. Application for subpœna.
No. 4. Subpœna.
No. 5. Application for order to take depositions.
No. 6. Order to take depositions and certificate on return.

(NOTE.—Read Rule 4 of the Rules of Practice of the Board and carefully observe the requirements thereof as to form, size, and style of papers.)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE

(See Rule 2)

UNITED STATES BOARD OF TAX APPEALS

APPLICATION FOR ADMISSION TO PRACTICE

I, _____, hereby apply for admission to practice before the United States Board of Tax Appeals, and submit the following:

1. I reside at _____, _____
(Street number) (City)
_____, _____.
(County) (State)

2. My office address is _____, _____
(Street number) (City)
_____, _____
(County) (State)

3. I was admitted to the bar of the _____ Court, of the
(Enter name of highest court)
State of _____, on the _____ day of _____ 192__, and have never been suspended or disbarred from practice before said court or any court of any State or the United States, except as follows: _____
_____

4. I am a member (or associate) of the firm _____.
_____

5. I am a member of _____
(State membership in professional societies)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE—Continued

Certified Public Accountants will use the following:

I was issued a certificate and authorized to practice as a certified public accountant by the_____of the State of_____
(Give name of board or commission)
on the_____day of_____, 192__, and such certificate has never been revoked nor have I been suspended from practice, except as follows:

_____

_____

_____

I am a member of_____
(State names of accountants' societies to which you belong)

_____

_____

and have never been suspended or expelled from any such society or any other recognized society of certified public accountants, except as follows:

_____

_____

_____
(Name of applicant)

STATE OF_____ }
*County of*_____ } *ss:*

_____, being first duly sworn, says that he is the person named in the foregoing application for admission to practice before the United States Board of Tax Appeals and that the statements of fact therein contained are true.

_____
(Signature of applicant)

Subscribed and sworn to before me this_____day of_____, 192__

_____

_____

CERTIFICATE

I, _____
(State whether clerk of court or secretary of State board or commission of accountancy)
hereby certify that_____, the applicant for admission to practice before the United States Board of Tax Appeals, is duly admitted to practice as_____by the
(State whether attorney or C. P. A.)
_____of the State of
(State name of court or State board or commission of accountancy)
_____and that he is now in good standing as such
(State whether attorney or C. P. A.)

_____
(Clerk of court or secretary of State board or commission of accountancy)

Dated_____, 192__.

[SEAL.]

No. 2.—PETITION

(See Rules 4, 5, 6, 7, and 8)

UNITED STATES BOARD OF TAX APPEALS

Petitioner, *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. ----------

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols) dated ----------, 192--, and as a basis of his proceeding alleges as follows:

1. The petitioner is (set forth whether individual, corporation, fiduciary, etc., as provided in Rule 6) with principal office (or residence) at ---------- (Street) ---------- (City) ---------- (State).

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on ----------, 192--.

3. The taxes in controversy are (income, profits, estate, or gift) taxes for the (calendar or fiscal) year 19--- and for ---------- dollars (state as exactly as possible the amount in dispute).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors: (Enumerate specifically the assignments of error in a concise manner and avoid pleading facts which properly belong in the succeeding paragraph.)

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows: (Here set forth allegations of the facts relied upon—but not the evidence—in orderly and logical sequence, with subparagraphs lettered, so as fully to inform the Board of the issues to be presented and to enable the Commissioner to admit or deny each specific allegation.)

Wherefore, the petitioner prays that this Board may hear the proceeding and (here state the relief desired).

Counsel for Petitioner,

(Post-office address)

STATE OF ----------
County of ---------- } *ss:*

----------, being duly sworn, says that he is the petitioner (if a corporation, or fiduciary, state title of office or trust of person verifying and that he is duly authorized to verify the foregoing petition) above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

Subscribed and sworn to before me this---------- day of----------, 192---.

No. 3.—APPLICATION FOR SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

---------- ,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

APPLICATION FOR SUBPŒNA

To the United States Board of Tax Appeals:

Application is hereby made for the issuance of a subpœna for the attendance before ----------

(The United States Board of Tax Appeals, or the name and official title of the person authorized to take depositions)

at ---------- of the following persons whose oral testimony is desired on behalf of ---------- in the matter of the tax liability of the above-named petitioner now pending on appeal:

(Petitioner or respondent)

NAME	ADDRESS
----------	----------
----------	----------
----------	----------
----------	----------
----------	----------

Details required under Rule 44:

Dated ----------, 192...

(Signed) ----------

No. 4.—SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

---------- ,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

SUBPŒNA

The President of the United States of America:

To ---------- Greeting.

You are hereby commanded under penalty of law to be and appear in your proper person before the ----------

(United States Board of Tax Appeals or the name and official title of the person authorized to take depositions)

No. 4.—SUBPŒNA—Continued

at ---------- on the ---------- day of ----------, 192--,
at ---------- o'clock ---- m., then and there to testify on behalf of
(Petitioner or respondent)
---------- in the matter of the tax liability of ----------
now pending before this Board.

You are required to bring with you the following, to wit: ----------
---

By order of the United States Board of Tax Appeals, this ---------- day of ----------, 192--.

[SEAL.]

(Member)

PROOF OF SERVICE

STATE OF ----------}
County of ----------} *ss:*

----------, being first and duly sworn, says:—I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding in which this subpœna was issued.

That on the ---------- day of ----------, 192--, I served the annexed subpœna on the following witnesses named therein at the places set opposite their respective names, by delivering to and leaving with each of them personally a copy of said subpœna and at the same time exhibiting to each of them this original:

NAME	PLACE OF SERVICE
----------	----------
----------	----------
----------	----------
----------	----------

(For witnesses subpœnaed on behalf of petitioner.)

That at the time of such service I tendered to each of said witnesses the sum of $ ----------, the same being the fees and mileage required by Rule 60 of the Rules of Practice of the Board.

Subscribed and sworn to before me
this ---------- day of ---------, 192--.

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS

(See Rules 45, 46, and 47)

UNITED STATES BOARD OF TAX APPEALS

....., Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. .....

APPLICATION FOR ORDER TO TAKE DEPOSITIONS

To the United States Board of Tax Appeals:

1. Application is hereby made by the above-named ..... (Petitioner or respondent) for an order to take the deposition.. of the following-named person..:

NAME OF WITNESS	POST-OFFICE ADDRESS
(a)	.....
(b)	.....
(c)	.....
(d)	.....

2. It is desired to take the depositions of the persons above named and each of them for the following reasons:

(a) .....will testify to the following material matters: .....

.....

(Set forth briefly the matter upon which said witness will be called to testify)

(b) .....will testify to the following material matters: .....

.....

(c) .....will testify to the following material matters: .....

.....

(d) .....will testify to the following material matters: .....

.....

3. The reasons why..... (Petitioner or respondent) desires to take the testimony of the above-named persons rather than have them appear personally and testify before the Board are as follows: (State specifically reasons for each witness for whom subpœna is required.)

4. It is desired to take the testimony of ..... (Names of witnesses)

.....

on the ..... day of ....., 192.., at the hour of ..... o'clock .... m.

(A date sufficiently in advance of the day set for hearing of the proceedings to enable the deposition to be completed and filed with the Board at least 10 days prior to the hearing)

before ..... in the City of .....

(State name and title of official)

State of ..... at Room .....

(Give number of room, street number, and name of building.)

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS—Continued

5. That _____ is a
(Name of official before whom depositions are to be taken)
_____, who has no office connection or business employ-
(Give official title)
ment with the petitioner or his counsel.

Dated _____, 192__.

_____
Counsel for Petitioner.

STATE OF _____ }
County of _____ } *ss:*

_____, being duly sworn, says that the foregoing
(Petitioner or counsel)
application for order to take depositions is made in good faith and for the reasons therein stated and that the same is not made for purposes of delay.

_____

Subscribed and sworn to before me this
_____ day of _____, 192__.

_____

No. 6.—ORDER TO TAKE DEPOSITIONS

(See Rule 45)

UNITED STATES BOARD OF TAX APPEALS

_____
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE
Respondent.
} Docket No. _____

ORDER TO TAKE DEPOSITIONS

On consideration of the application of _____ to take
(Petitioner or respondent)
the testimony by deposition of _____
(Names of witnesses)
_____
residing at _____, alleged to be material witnesses in this proceeding, at _____
(Room number, street number, and place)
_____ on the _____ day of _____, 192__, at ____ o'clock __ m., and it appearing therefrom that _____ a _____ of _____ is a person
(Official title) (Address)
authorized to administer oaths under the Revenue Act of 1926, it is by the Board:

ORDERED, that the depositions of the said witnesses above named be taken at _____
(Room number, street number, and place)
_____ commencing on the _____ day of _____, 192__, at ____ o'clock __ m.

And it is further ORDERED, That the said depositions be taken before _____ of _____, a _____
(Official title)
who is hereby designated by the Board for that purpose.

No. 6.—ORDER TO TAKE DEPOSITIONS—Continued

The said depositions shall be taken and the same returned to this Board in accordance with the rules of the Board.

_____
(Member, United States Board of Tax Appeals)

Dated _____, 192__.
[SEAL.]

CERTIFICATE ON RETURN

(See Rule 46)

I, _____, the person named in the foregoing order to take depositions, hereby certify:

1. I proceeded, on the _____ day of _____, A. D. 192__, at the office of _____, in the city of _____, State of _____, at _____ o'clock, __ m., under the said order and in the presence of _____ and _____, the counsel of the respective parties, to take the following depositions, viz:

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

That said witness ____ were examined under oath at such times and places as conditions of adjournment required, and that the testimony of said witness __ (or their answers to the interrogatories filed) was taken stenographically and reduced to typewriting by me or under my direction.

2. I further certify that after the said testimony of said witness ____ was reduced to writing the transcript of the testimony was read and signed by said witness ____ in my presence, and that _____ acknowledged
(Each of them or he)
before me that said testimony was in all respects truly and correctly transcribed.

3. I further certify that, after the signing of the deposition in my presence, no alterations or changes were made therein.

4. I have no office connection or business employment with the petitioner or his attorney except that of _____, objection to which was waived
(State connection)
by both the parties to the proceeding.

[SEAL.]

_____
(Signature of person taking deposition)

_____
(Official title)

(NOTE.—This Certificate on Return, when properly executed, and also the Order to Take Depositions, should be attached to and bound with the transcript, preceding the first page thereof. It should then be inclosed in a sealed envelope and addressed to United States Board of Tax Appeals, Earle Building, Washington, D. C. See Rules 45 and 46 of the Rules of Practice and Procedure of the Board as to specific requirements for taking depositions.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 130.

OLD COLONY TRUST COMPANY, ET AL., *Executors,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION OF W. A. SUTHERLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please The Court:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

W. A. SUTHERLAND,
Counsel, Amicus Curiae.

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I.

PRELIMINARY STATEMENT.

We represent a taxpayer whose case was appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926. The hearing was had and decision rendered after the passage of the 1926 Act. The decision was against the taxpayer and the case was appealed to the Cir-

cuit Court of Appeals. The Circuit Court of Appeals rendered judgment sustaining the Board's decision on the ground that taxpayer had not introduced sufficient evidence to sustain its contentions. Petition was made to this court for certiorari and certiorari was denied. Our interest lies in showing that the Circuit Court of Appeals does not have jurisdiction in this class of cases because its judgment does not preclude the taxpayer from claiming a refund and suing therefor, and does not preclude the Commissioner of Internal Revenue—an Executive Officer—from voluntarily granting a refund.

We address ourselves, therefore, to a partial answer to the Court's first question propounded on February 18, 1929:

> "Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?"

Our answer to this question relates only to cases appealed to the Board of Tax Appeals prior to the passage of the 1926 Act and in which hearing was had and decision rendered after the passage of the 1926 Act.

We regret that we were called into this matter so late that we have not been able to make the exhaustive research of the authorities, especially as relates to certain broad constitutional questions, which the Court's inquiry in this case presents an opportunity to develop. However, our answer does not require a consideration of these questions. It rests on statutory construction. The only constitutional questions which it involves are beyond dispute. If the Court should, in view of the vast importance of the question, at any time desire a reargument of the matter, we trust that we may be given permission to file another brief going into these other questions.

II.

STATUTES INVOLVED.

The pertinent portions of the Revenue Acts of 1924 and 1926 are set forth in the first supplemental brief of the Commissioner of Internal Revenue. It is unnecessary, therefore, again to set forth these statutes.

III.

ARGUMENT.

Summary of Argument.

1. We concede for purposes of this brief that the Circuit Court of Appeals does have jurisdiction of appeals from the Board of Tax Appeals in cases appealed to the Board subsequent to the passage of the Revenue Act of 1926.

2. The Circuit Court of Appeals does not have jurisdiction of cases appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, if its judgment may be upset by executive action in allowing claim for refund based upon the same cause of action or by the judgment of another court in an action on a rejected claim for refund.

3. In cases filed with the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, that Act expressly reserves to taxpayer the right to file claim for refund and, if it is rejected, to bring suit thereon, notwithstanding the decision of the Board of Tax Appeals and affirmance by the Circuit Court of Appeals.

4. If the Circuit Court of Appeals' decision were final, it would in many cases be possible for the Commissioner of Internal Revenue to deprive taxpayer of the right to

file claim for refund and sue thereon, in spite of the express guarantee of this right contained in the Revenue Act of 1926.

1. WE CONCEDE FOR PURPOSES OF THIS BRIEF THAT THE CIRCUIT COURT OF APPEALS DOES HAVE JURISDICTION OF APPEALS FROM THE BOARD OF TAX APPEALS IN CASES APPEALED TO THE BOARD SUBSEQUENT TO THE PASSAGE OF THE REVENUE ACT OF 1926.

We agree with the argument in the American Bar Association brief with reference to the constitutionality of the provisions giving jurisdiction to the Circuit Court of Appeals to review decisions of the Board of Tax Appeals in cases filed with the Board subsequent to the passage of the 1926 Act. There the judgment of the Board is final unless appeal is taken to the Circuit Court of Appeals, and the judgment of the Circuit Court of Appeals is final unless certiorari is granted by this court. The Commissioner does not have authority to allow a refund of taxes contrary to the decision of the Board, or if the case is appealed, contrary to the decision of the Court. Nor can the taxpayer in such a situation maintain suit for refund. Under such circumstances the jurisdiction of the Circuit Court of Appeals should certainly be sustained if this Court is to continue to permit appeals from the Federal Trade Commission and the Secretary of Agriculture and the Board of General Appraisers and the like.

The situation where the appeal to the Board of Tax Appeals is taken prior to the passage of the 1926 Act is entirely different.

2. THE CIRCUIT COURT OF APPEALS DOES NOT HAVE JURISDICTION OF CASES APPEALED TO THE BOARD OF TAX APPEALS PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1926 IF ITS JUDGMENT MAY BE UPSET BY EXECUTIVE

ACTION IN ALLOWING CLAIM FOR REFUND BASED UPON THE SAME CAUSE OF ACTION OR BY THE JUDGMENT OF ANOTHER COURT IN AN ACTION ON A REJECTED CLAIM FOR REFUND.

If the judgment of the Circuit Court of Appeals upon appeal from the Board of Tax Appeals is not conclusive of the rights of the parties so that no change can be made in these rights by an executive officer of the Government or by a court in a suit upon a rejected claim for refund, the Circuit Court of Appeals is without jurisdiction. As a matter of constitutional law we do not feel that this requires the citation of authority. The Committee of the American Bar Association in its first brief as amici curiae, attempting to sustain jurisdiction of the Circuit Court of Appeals, make it perfectly clear that they do not question this proposition.

See *Hayburn's Case*, 2 Dallas 409n (1792).
U. S. v. *Ferreira*, 13 How. 40 (1851).
Gordon v. *U. S.*, 2 Wall. 561, 117 U. S. 697 (1865).

In order therefore to show that the Circuit Court of Appeals does not have jurisdiction it is necessary only to show that its judgment does not have such finality as will bar a refund by the Commissioner of Internal Revenue or suit therefor by the taxpayer upon the same cause.

3. IN CASES FILED WITH THE BOARD OF TAX APPEALS PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1926, THAT ACT EXPRESSLY RESERVES TO TAXPAYER THE RIGHT TO FILE CLAIM FOR REFUND AND BRING SUIT THEREON NOTWITHSTANDING THE DECISION OF THE BOARD OF TAX APPEALS AND AFFIRMANCE BY THE CIRCUIT COURT OF APPEALS.

Prior to the passage of the 1926 Act the decision of the Board of Tax Appeals was not binding upon either party. The Commissioner could bring suit in court to recover any

taxes disallowed by the Board and the taxpayer could bring suit in court to recover any amounts found to be due by the Board and paid by the taxpayer, or the Commissioner could refund to the taxpayer without suit. The Boards' findings were only *prima faice* evidence. The result was that when a taxpayer appealed to the Board of Tax Appeals he did not surrender the right always preserved to him by the Revenue Acts of the United States—even though not required by the Constitution—to file suit against the collector in the district court and have a jury trial on all issues of fact. The Commissioner, if he lost, could bring a suit *de novo* in the District Court.

When Congress came to enact the Revenue Act of 1926 it had come to feel that there was unnecessary duplication of effort where a case was tried, according to legal procedure, in the Board of Tax Apeals and then tried over again in an action in the District Court brought by the losing party. It therefore provided that no claim for refund should ever be filed if the taxpayer, within the sixty days after the receipt from the Commissioner of the notice giving him the right to go to the Board of Tax Appeals, filed appeal with the Board of Tax Appeals. It is not necessary that the case ever be heard. Even if the petition is voluntarily withdrawn by the taxpayer, his rights to a judicial determination of his tax liability is forever barred.

Congress felt it was necessary to provide specially for cases in which the petition was filed before the 1926 Act and the hearing had and the decision rendered thereafter. It might have treated these cases just as it treated those cases in which the hearing was had before the passage of the 1926 Act, leaving the taxpayer and the Commissioner without right of appeal, just as under the 1924 Act. It might have provided that the decision of the Board was final and barred refund and that an appeal was the only remedy. It might possibly have provided that though the decision of

the Board of Tax Appeals was not final, the case could be appealed to the Circuit Court of Appeals and its decision would be final, though there is some doubt as to the constitutionality of such a provision. Congress did not do either of these things, but provided that the only remedy of the Commissioner is by appeal, if he is dissatisfied with the decision, and that the tapayer may appeal or not, as he chooses, but provided that in any event the taxpayer shall not be barred from filing claim for refund. That is tantamount to saying that the decision of the Circuit Court of Appeals is not final; and, as stated above, Congress could not constitutionally provide for an appeal to the Circuit Court of Appeals where that Courts' decision is subject to administrative review, or to be upset by suit upon a rejected claim for refund.

In referring to cases of the character here discussed, Section 283(b) says:

> "In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and *except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.*

Section 284(d)—which appears in that section of the 1926 Act granting to taxpayers the right to file a claim for refund of all income taxes overpaid—is directed to excepting from the provisions of section 284(a) those cases in which appeal to the Board of Tax Appeals shall operate to bar a claim for refund. The exception, by its express terms, is confined to cases where the taxpayer, "after the

enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed."

It is conceded by all that section 283(b) permits the taxpayer, whose petition is filed with the Board prior to the 1926 Act, to file a claim for refund and to sue thereon, though the Board has rendered a decision against him. It has been contended, however, that section 283(b) is to be construed to provide that if the taxpayer then carries the matter to the Circuit Court of Appeals, the decision of that court is final and bars any claim for refund.

It is respectfully submitted that the language of the section 283(b) does not lend itself to any such interpretation. In the same sentence with the provision which preserves the taxpayer's right to a claim for refund in cases appealed to the Board prior to the 1926 Act by excepting them from the provisions of Section 284(d), we find not only a reference to the jurisdiction of the Board but also to the jurisdiction of the reviewing courts. This same sentence which preserves the right to a refund provides for review by the courts, and does not distinguish cases appealed to the courts from those not so appealed. The language of that paragraph clearly considers both the Board and the Court reviewing the Board's decision as forums in which no determination will be reached which will bar a claim for refund.

This section preserves in clear language the right of the taxpayer filing with the Board prior to the 1926 Act to file claim for refund, although he goes to the Board and carries the Board's decision to the courts for review. It is simply a wishful argument which construes it so as not to allow to the taxpayer the right to file claim for refund and bring suit thereon with the attendant advantages of a jury trial. The language makes absolutely no distinction, so far as the right to claim for refund is concerned, between

a case where appeal has been taken to the Circuit Court of Appeals and one where appeal has not been so taken.

Stress is laid, however, upon the provisions of Section 1003(a) of the 1926 Act which provides that the judgment of the Circuit Court of Appeals on review of decisions of the Board shall be "*final,*" except that it shall be subject to review by the Supreme Court of the United States. Great stress is laid upon the use of the word "*final*" in this Section.

It is respectfully submitted that the word "*final*" as there used has no reference to and does not in any way concern itself with the matter as to whether the judgment of the Circuit Court of Appeals shall be "*final*" in the sense that it will bar a claim for refund in the case of a petition filed with the Board of Tax Appeals prior to the 1926 Act. The word "*final*" is used in Section 1005(a) where it clearly has the same meaning which it has in Section 1003(a). By no stretch of the imagination can the use of the word "*final*" in Section 1005(a) be said to contemplate a bar to a suit for refund where the petition was filed with the Board prior to the 1926 Act. Section 1005(a) provides that the decision of the Board shall become "*final*" when the expiration of the time for filing a petition for review is expired. Clearly, if no petition for review were filed in a case such as we are now discussing there would be a right to file a claim for refund. There is then no reason to attribute to the word "*final,*" in Section 1003(a), a meaning which would bar a claim for refund in the class of cases we are discussing.

Of course it could not be argued that the judgment of the Circuit Court of Appeals, in passing upon a decision of the Board, is final for the reason that the matter there determined could not, on ordinary principles of *res adjudicata,* be relitigated in a subsequent proceeding. Such an argument would assume the jurisdiction of the Circuit Court

of Appeals and the finality of its judgment as against any subsequent claim or suit for refund, whereas this is the very point in issue.

The same reply may be made to the possible suggestion that an amount paid by a taxpayer after a judgment of the Circuit Court of Appeals upon review of the Board's decision cannot be considered an *"overpayment"* within the meaning of section 284(a) because it is made in accordance with a final court decision. This argument again assumes the very point in dispute. If the decision is not a bar to a subsequent claim for refund, it does not prevent a payment from being an *"overpayment"* if it is in excess of the tax properly due.

It is urged in one of the briefs filed with this Court that the exception from the operation of Section 284 (b) contained in Section 283 (b), applies only to issues not actually raised before the Board. But, according to our understanding, it is true (as the author concedes) that all cases heard after the 1926 Act are heard and decided *under exactly the same procedure and on exactly the same basis*, as cases filed after the 1926 Act. We understand that the total tax liability for the year is in issue as much in cases *heard* after the 1926 Act as in those *filed* after the 1926 Act. In all cases *filed* after the 1926 Act all issues with reference to the year's taxes must be raised or the matter becomes *res judicata* just as if they had been raised. What reason is there for saying that Section 283(b) is to be so construed as to relieve from the principle of *res judicata* as to those issues which might have been raised and were not, but does not relieve from that principle as to issues which were raised? We submit that there is nothing to justify such construction of the exception.

It is urged in the brief above referred to that the mere absence of a prohibition against suit in a matter which has

already been litigated gives rise to no affirmative right. This is not the situation which exists under the 1926 Act with reference to petitions filed with the Board prior to its passage. We have in Section 283 (b) an express exception from a prohibition, which prohibition is made applicable to all future cases. This compels the conclusion of the grant of an affirmative right just as if it were expressly stated.

We have construed this statute without reference to the legislative history. We respectfully submit that the language of the statute is too clear to require a consideration of the legislative history. If, however, this Court feels that there is any doubt or ambiguity in the words of the statute this doubt is entirely removed by reference to the report of the Senate Committee which, in reporting Section 283(b) of the Act to the Senate, expressly called attention to the fact that the right to file a claim for refund was sill open after an appeal from the Board's decision to the Circuit Court of Appeals and a review by this Court. The report said:

> "But it should be noted that the taxpayer, despite his appeal to the Board, is not barred from suit for refund. If he takes advantage of the *appeal to the Court it is not likely that he will bring suit for refund after the Supreme Court has decided against him on his appeal from the Board.*"

The Committee would hardly have stated that a taxpayer was "*not likely*" to bring suit for refund, unless it clearly recognized that he had the legal right to sue for refund, notwithstanding the judgment of the Circuit Court of Appeals. It is also clear from the language of the Committee Report that the Committee had in mind the possibility of the same issues which had been tried before the Board being raised in a suit for refund. The decision of the courts on

altogether different issues would not have any great tendency to deter future suits.

4. IF THE CIRCUIT COURT OF APPEAL'S DECISION WERE FINAL IT WOULD IN MANY CASES BE POSSIBLE FOR THE COMMISSIONER OF INTERNAL REVENUE TO DEPRIVE TAXPAYER OF THE RIGHT OF A SUIT UPON CLAIM FOR REFUND IN SPITE OF THE EXPRESS GUARANTEE OF THE REVENUE ACT OF 1926.

In one of the briefs filed with this Court in support of jurisdiction it is admitted that it would not have been fair to deprive the taxpayer who had filed his petition under the 1924 Act of his right to a suit for refund. It was there stated that the *primary purpose* of the Section 283(b) was to permit the taxpayer in this class of cases to exercise his option after the decision by the Board; that is, then to determine whether he preferred to pay the tax and sue for refund or obtain a review in court of the board's decision.

This argument seems to us to overlook the possibility that the Commissioner may himself have the Circuit Court of Appeals review the decision of the Board which may be distasteful to him in certain respects. Section 1001(a) of the 1926 Act gives the Commissioner the same right to a review by the Circuit Court of Appeals as is given to the taxpayer. The taxpayer has no means of preventing the Commissioner seeking such a review. When the Commissioner does secure this review and decision is rendered in favor of the Commissioner and against the taxpayer, will the taxpayer thereby be deprived of the right which Congress took such pains to preserve to him? Or is it to be suggested that the decision of the Circuit Court of Appeals on the review of a decision of the Board of Tax Appeals in a case filed with the Board prior to the 1926 Act is to be final, so as to bar claims or refund, where the appeal is taken by the taxpayer, but is not to be final where the ap-

peal is taken by the Commissioner? We do not believe that anyone would seriously make this suggestion. If the decision of the Circuit Court of Appeals is final in the one case, it is final in the other. If it is final, it lies within the power of the Commissioner in every case where any portion of the decision is against him to render nugatory all the provisions of the Act designed to preserve to the taxpayer his right to file claim for refund and sue thereon.

IV.

CONCLUSION.

It is respectfully submitted in conclusion that Congress clearly provided, in cases of appeal to the Board of Tax Appeals prior to the 1926 Act, that the decision of the Board is not final and that no affirmance of that decision on a review by the Circuit Court of Appeals is final so as to bar claim for refund or suit thereon. There is here presented no case to which the jurisdiction of the Circuit Court of Appeals can extend.

Respectfully submitted,

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